No. 26 Orig.

Supreme Court of the United States

IN THE MATTER

of

THE APPLICATION OF J. RAYMOND TIFFANY, as receiver appointed by the Court of Chancery of New Jersey of William Necker, Inc., a body corporate, for a writ of mandamus, or in the alternative a writ of prohibition, against the Honorable J. Warren Davis, District Judge of the United States, for the District of New Jersey, and against the District Court of the United States for the District of New Jersey

PETITION FOR WRIT OF MANDAMUS

DOUGLAS HERR
Attorney and Counsel for Petitioner

—1919—

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And now comes the petitioner, J. Raymond Tiffany, as Receiver appointed by the Court of Chancery of New Jersey of William Necker, Inc., a body corporate, by Dougal Herr, Esquire, his attorney and counsel; and moves for leave to file the petition for a writ of mandamus, or in the alternative for a writ of prohibition, hereto annexed; and he further moves that a rule be entered and issue directing the Honorable J. Warren Davis, District Judge of the United States for the District of New Jersey, and directing the District Court of the United States for the District of New Jersey to show cause why a writ of mandamus, or in the alternative a writ of prohibition should not

issue against them and each of them in accordance with the prayer of the petition hereto attached, and why said petitioner should not have such other and further relief in the premises as may be just and proper.

DOUGAL HERR,

Attorney and Counsel for Petitioner.

Petition.

IN THE SUPREME COURT OF THE UNITED STATES.

To the Honorable Edward D. White, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States.

The petition of J. Raymond Tiffany, as receiver appointed by the Court of Chancery of New Jersey of William Necker, Inc., a body corporate, respectfully shows:

1. Your petitioner is a resident of the City of Hoboken, County of Hudson and State of New Jersey, and a citizen of the United States.

2. On September 30, 1916, a bill in equity was filed in the District Court of the United States for the District of New Jersey by persons resident in the State of New York, being a creditor and stockholders of William Necker, Inc., a corporation duly organized and existing under the laws of the State of New Jersey, against said corporation, alleging that its affairs were in such condition that unless their administration should be taken over by the court there would be loss to creditors and stockholders. A copy of said bill of complaint is hereto attached marked "Schedule A" and made a part hereof.

3. After the filing of said bill, and on September 30, 1916 the Honorable J. Warren Davis, District Judge of the United States for the District of New Jersey, made an order in said cause appointing a receiver therein. A copy of said order is hereto attached and marked "Schedule B" and made a part hereof.

4. Thereafter, said federal receiver continued the business of said corporation and has conducted the same down to the present time.

5. On March 28, 1919, a bill of complaint was filed in the Court of Chancery of New Jersey by creditors of said corporation against said corporation for the appointment of a receiver, on the ground that said corporation was insolvent and that its business had been and then was being conducted at great loss and greatly to the prejudice of the interests of its creditors and stockholders, and that its business could not be conducted with safety to the public and advantage to the stockholders, pursuant to the provisions of an act of the legislature of the State of New Jersey entitled "An act concerning corporations (Revision of 1896)" and the acts amendatory thereto and supplementary thereof. A copy of said bill of complaint is hereto annexed, marked "Schedule C" and made a part hereof.

6. Upon the filing of said Chancery bill, and on April 1, 1919 an order was duly made and entered in the Court of Chancery of New Jersey appointing your petitioner receiver of said corporation under said statute, and thereafter on April 22, 1919, your petitioner's appointment as such receiver was duly confirmed by an order of said court. Copies of both of said last mentioned orders are hereto attached, marked respectively "Schedule D" and "Schedule E" and made a part hereof.

7. Your petitioner duly qualified as such receiver on April 4, 1919 and has ever since and now is acting as such receiver.

8. On April 7, 1919 your petitioner, acting under instructions of said Court of Chancery, made application to the Honorable J. Warren Davis, District Judge of the United States as aforesaid, to intervene in said proceedings pending in said District Court, for the purpose of urging that the proceedings in the State Court superseded the proceedings in the Federal Court; and to ask the Federal Court to direct the delivery to your petitioner, a receiver as aforesaid, of the assets of the said corporation for administration in said Court of Chancery, after, however, the receiver of the District Court should have been compensated and administration expenses paid or provided for; to ask the District Court to, in any event, turn over to your petitioner, as receiver as aforesaid, the funds derived through the administration in the Federal Court before any distribution to creditors, to the end that the funds might be dealt with in accordance with the said statute of the State of New Jersey, and for further relief, whereupon such proceedings were had in said District Court that an order was made by the said Honorable J. Warren Davis, District Judge as aforesaid, a copy of which is hereto attached, marked "Schedule F," and made a part hereof, and following the making of said last mentioned order and on April 10, 1919 a petition was filed in said Federal Court by your petitioner a copy of which is hereto attached, marked "Schedule G" and made a part hereof. Thereafter a brief was filed in said Federal Court by your petitioner in accordance with the requirements of the order marked "Schedule F". That such proceedings were had on the application of your pe-

titioner that the said Honorable J. Warren Davis District Judge as aforesaid, handed down an opinion, a copy of which is hereto attached, marked "Schedule H" and made a part hereof. That an order has been entered in accordance with the said opinion and your petitioner asserts that the said District Court of the United States has and will continue to decline to grant the petition of your petitioner and has proceeded and will continue to proceed with the administration of the estate of the said William Necker, Inc., in that court. That the bill of complaint filed in the United States District Court for the District of New Jersey on the 30th of September, 1916, made the said William Necker, Inc. sole defendant and prayed for an answer, and that the claim and interest of complainant as well as that of all other creditors and stockholders might be ascertained and determined and the assets of the said defendant corporation marshaled and the liens and priorities of all parties in interest therein determined and adjudged and the several creditors enjoined and restrained from dissipating said assets through their several and individual demands, suits or levies and that the assets of said corporation might be administered as a trust fund for the benefit of complainant and all others having an interest therein, and that it might be adjudged and determined that the business had been and was being conducted at a loss and in a manner greatly prejudicial to the interests of its stockholders, and that a receiver or receivers might be appointed to take charge of the property, business and assets of said corporation, with power to continue the same, and with such other powers and authority as might be permitted by law and directed by the court, and for a writ of injunction restraining the defendant corporation and its

officers and agents from further exercising its franchises and from collecting or receiving any of its debts due to it or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects except to a receiver or receivers appointed by the court, and for a writ of subpoena, and for no other or further relief except as above set forth. That the order of the United States District Court made on the 30th day of September, 1916 appointing the receiver ordered, adjudged and decreed "that Thomas F. Martin be and he is hereby appointed temporary receiver" of the defendant and of all the property of the defendant, and authorized the receiver to take possession of the property and to run, manage and operate the business, to exercise the authority and franchises of the corporation, to hire and discharge employees, to pay off current necessities for labor and supplies, to purchase additional material, to issue receiver's certificates in such sums as might be thereafter authorized by order of the court, to institute suits, to defend suits, to pay expenses of operation and of executing his trust. The said order further required the officers, directors, agents and employees of the defendant and all persons whomsoever to, upon demand of the receiver, turn over and deliver to the receiver books of account and property of every nature and description and each and every of them were commanded and required to obey and perform such orders as might be given to them from time to time by the receiver in conducting the operation and management of the property of the defendant company. And it was further ordered that the defendant and its officers, directors, agents and employees and all other persons claiming to act by, through or under the defendant, and all other persons whomsoever, be en-

joined from interfering in any way with the possession or management of any part of the property over which the receiver was appointed, or interfering in any way to prevent the discharge of his duties, or his managing and operating the business and property of the defendant and from instituting or prosecuting any suits or actions against the defendant or against the receiver without leave of court. That upon the return day of the order to show cause an order was made making the appointment of the receiver permanent; that such order did not in any wise enlarge the powers of the receiver nor did it grant any further injunctive relief. That from the said 30th day of September, 1916 down to the present time the said receiver has been managing and operating the business of said defendant corporation as a going concern and has been contracting and paying debts. That no orders have been made by the United States District Court directing creditors to come in and prove claims, and no steps have been taken by that court or by the receiver looking toward the ultimate distribution of the assets of the corporation. Your petitioner asserts that the proceedings in the United States District Court were not under the provisions of the statute of the State of New Jersey, to wit, "An act concerning corporations, (Revision of 1896)" and its supplements and amendments, but all proceedings were under the general equity jurisdiction of the Federal court.

9. That your petitioner was appointed receiver by the Chancellor of the State of New Jersey upon the 1st day of April, 1919; that the order appointing your petitioner recited that it appeared to the court that the business of the defendant corporation had been and was being conducted at great loss and greatly prejudicial to the inter-

ests of its creditors and stockholders so that its business could not be conducted with safety to the public and advantage to the stockholders, and that the injunction provided for by the "Act Concerning Corporations," revision of 1896 should issue, and that a receiver should be appointed; it further adjudged "that the business of the defendant corporation has been and is being conducted at great loss and greatly prejudicial to the interests of its creditors and stockholders" so that its business could not be conducted with safety to the public and advantage to the stockholders, and enjoined the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting and receiving any debts, or paying out, selling, assigning or transferring any estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the court. It further appointed your petitioner receiver of said corporation under the statute. That by an order made by the said Chancellor on the 22nd day of April, 1919 your petitioner was continued as receiver. That such order of the Court of Chancery of New Jersey is in full force and effect, and your petitioner is, as before stated, still acting in his capacity as receiver; that on the 8th day of April, 1919 an order was made by the Court of Chancery of New Jersey directing creditors to bring in their claims against said corporation within thirty days from the date of said order; that in pursuance of said order and notice thereof sent out in accordance with the directions thereof claims have been filed with your petitioner upon which your petitioner has acted; that appeals from your petitioner's determination have been taken in accordance with the provisions of the statute to the Chancellor, and such appeals are now pending before the Chancellor undeter-

mined; that the time within which creditors should file claims with your petitioner has expired; that it is the practice, however, of the Court of Chancery to, at any time before final distribution, permit creditors to file claims upon application to the court; that your petitioner is now engaged in administering the affairs of said insolvent corporation with a view to ultimate distribution among creditors and others entitled thereto in accordance with the provisions of the statute of the State of New Jersey in such case made and provided. That the section of the statute under which the Chancellor appointed your petitioner receiver is section 65 of the Act Concerning Corporations, as amended by the laws of 1912, p. 535, approved April 1, 1912, which said section is found in the Compiled Statutes of New Jersey, 1st Supplement, p. 425, and reads as follows:

> "Sec. 65. Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, or if its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, any creditor or stockholder may by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the Court of Chancery for a writ of injunction and the appointment of a receiver or receivers or trustee or trustees, and the court being satisfied by affidavit or otherwise of the sufficiency of said application and of the truth of the allegations contained in the petition or bill, and upon such notice, if any, as the court by order may direct, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short

time thereafter, or that its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, so that its business cannot be conducted with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the court, until the court shall otherwise order."

That section 66 of said statute, found in Compiled Statutes of New Jersey, volume 2, p. 1643, reads as follows:

"Sec. 66. The Court of Chancery, at the time of ordering said injunction, or at any time afterwards, may appoint a receiver or receivers or trustees for the creditors and stockholders of the corporation, with full power and authority to demand, sue for, collect, receive and take into their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description of the corporation, and to institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation, and in his or their discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation, and in case of mutual dealings between the corporation and any person to allow just set offs in favor of such person in all cases

in which the same ought to be allowed according to law and equity; a debtor who shall have in good faith paid his debt to the corporation without notice of its insolvency or suspension of business, shall not be liable therefor, and the receiver or receivers or trustees shall have power to sell, convey and assign all the said estate, rights and interests, and shall hold and dispose of the proceeds thereof under the directions of the court of chancery; the word receiver as used in this act shall be construed to include receivers and trustees appointed as provided in this act."

That section 67 of said act reads as follows:

"Sec. 67. Every receiver shall before acting enter into such bond and comply with such terms as the court may prescribe, and take and subscribe the following oath or affirmation: 'I, ... do swear (or affirm) that I will faithfully, honestly and impartially execute the powers and trusts reposed in me as receiver, for the creditors and stockholders of the ....., and that without favor, or affection,' which oath or affirmation shall be filed in the office of the clerk in chancery within ten days after the taking thereof."

That section 68 reads as follows:

"All the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto."

That section 71 reads as follows:

"Sec. 71. Such receiver shall have power to send for persons and papers and to examine any persons, including the creditors and claimants, and the president, directors and other officers and agents of the corporation, on oath or affirmation (which oath or affirma-

tion the receiver may administer) respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, and choses in action, real and personal estate and effects of every kind, and also respecting its debts, obligations, contracts and liabilities, and the claims against it; and if any person shall refuse to be sworn or affirmed, or to make answers to such questions as shall be put to him, or refuse to declare the whole truth touching the subject-matter of the said examination, the court of chancery may, on report by the receiver, commit such person to prison, there to remain until he shall submit himself to be examined, and pay all the costs of the proceedings against him."

That section 75 reads as follows:

"Sec. 75. The court of chancery may limit the time within which creditors shall present and make proof to such receiver of their respective claims against the corporation, and may bar all creditors and claimants failing so to do within the time limited from participating in the distribution of the assets of the corporation; the court may also prescribe what notice, by publication or otherwise, shall be given to creditors of such limitation of time."

That section 76 reads as follows:

"Sec. 76. Every claim against an insolvent corporation shall be presented to the receiver in writing and upon oath; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver shall direct, and shall produce such books and papers relating to the claim as shall be required; and the receiver shall have power to examine, under oath or affirmation, all witnesses produced before him touching the claims, and shall pass upon and allow or disallow the claims, or any part thereof, and notify the claimants of his determination."

That section 78 reads as follows:

> "Sec. 78. Every such insolvent corporation, or any person aggrieved by the proceedings or determination of such receiver in the discharge of his duty, may appeal to the court of chancery, which court shall, in a summary way, hear and determine the matter complained of, and make such order touching the same as shall be equitable and just."

That section 86 reads as follows:

> "Sec. 86. After payment of all allowances, expenses and costs, and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionally to the amount of their respective debts, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors; and the creditors shall be entitled to distribution on debts not due, making in such case a rebate of interest, when interest is not accruing on the same; and the surplus funds if any after payment of the creditors and the costs, expenses and allowances aforesaid, and the preferred stockholders, shall be divided and paid to the general stockholders proportionally, according to their respective shares."

That by a supplement to said act concerning corporations adopted by the legislature of the State of New Jersey, approved April 15, 1919, laws of 1919, Chapter 208, it was provided:

> "1. In all cases in which the Court of Chancery may issue an injunction under the provisions of section sixty-five of the act to which this act is a supplement as amended, or as it may hereafter be amended, the following provisions of the said act shall apply, to wit: sections sixty-six, sixty-seven, sixty-eight, sixty-nine, seventy, seventy-one, seventy-two,

seventy-three, seventy-four, seventy-five, seventy-six, seventy-seven, seventy-eight, seventy-nine, eighty, eighty-one, eighty-two, eighty-three, eighty-four, eighty-five, and eighty-six, notwithstanding any language in any such sections, as would appear to limit their application to cases in which the appointment of a receiver is made on the ground of insolvency."

"2. All levies, judgments, attachments or other liens obtained through legal proceedings against a corporation, if at the time such levy judgment, attachment or other lien was obtained the said corporation be insolvent, at any time within four months prior to the filing of a bill or petition against it for the appointment of a receiver, under the provisions of the act to which this act is a supplement, shall be deemed null and void in case a receiver shall be appointed by the court and the assets of said corporation distributed in such proceedings, and the property affected by such levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the receiver as a part of the estate of the corporation, unless the court shall order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate, and thereupon the same may pass to and shall be preserved by the receiver for the benefit of the estate aforesaid, and the court may order such conveyance as shall be necessary to carry the purpose of this section into effect; provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien of a *bona fide* purchaser for value who shall acquire the same without notice or reasonable cause for inquiry."

"3. After the filing of a bill for the appointment of a receiver under the provisions of the act to which this act is a supplement, if, as a result of such proceedings, a receiver

be appointed and the assets of the corporation distributed in the proceeding no lien or priority shall be obtained by levy, judgment, attachment or otherwise, and all attempted levies, judgments, attachments or other liens, by virtue of legal proceedings, shall be null and void as against the receiver."

"4. The title and right of any receiver appointed under the provisions of the act to which this act is a supplement shall be held, for the purpose of avoiding liens and preferences, to relate back to the time of the filing of the bill or petition."

"5. If any section or portion of this act shall be declared unconstitutional or invalid for any reason whatsoever, the rest shall remain in force."

"6. This act shall take effect immediately."

10. Your petitioner further states that by a long line of judicial decisions in the courts of highest jurisdiction in the State of New Jersey it has been held and firmly established to be the law that the complainant in an action brought under the statute has no personal interest in the controversy other than his right if he be a creditor or stockholder to share in final distribution; that he has no control of the litigation; that he acts in the place of the Attorney General; that although a receiver may be appointed upon his application and it afterwards transpires that he has no claim against the corporation the proceedings do not abate; that the proceedings are in the nature of an equitable *quo warranto;* that they are in the nature of probate proceedings; that the proceedings are an exercise by the State of its sovereign power to wind up and distribute the assets of one of its creatures; that the receiver is an independent ego representing not only the corporation but its creditors and stockholders, exercising all the privileges and franchises of the corporation, hav-

ing title to all of its property, and at the same time standing in the position of an administrator representing the State. In the case of *Gallagher vs. Asphalt Company of America*, 67 N. J. E. 441, at p. 444 Vice Chancellor Stevenson said, referring to the statute under which your petitioner was appointed:

> "When we have either a creditor or a stockholder qualified to appear as the actor, to set in motion the machinery of the court for the accomplishment of justice, for securing this important remedy on behalf of the public for the prevention of fraud, certainly there is a very strong indication that what the statute is aimed to secure is the redress or the prevention of a public wrong rather than the enforcement of a private right—a private right either of a stockholder qua stockholder, or of a creditor qua creditor."
>
> "About forty or fifty years ago, Chancellor Williamson, in the leading case of *Rawnsley v. Trenton Life Insurance Co.*, 9 N. J. Eq. 95, said with that clearness which characterized almost everything that he ever did say, it is not the particular grievance of the party complainant which is redressed in this proceeding; it is the public grievance. I am giving substantially his language; I have recently had occasion to quote it in an opinion. It is not, he says in substance, the private interest of the party complainant; it is the public interest which is cared for, including the general interest of the stockholders and creditors."

And further:

> "I take it that in this case the substitution in New Jersey of the attorney general as the necessary actor in this case by any stockholder or any creditor was made simply because the legislative policy could be, would be inevitably carried out more fully in greater numbers of instances by leaving the power to institute the proceeding with a stockholder, or a

creditor—any stockholder or any creditor * * *. That this is not a creditors' suit, but that it is such a quasi public proceeding, I think is well illustrated by the fact that the suit can be prosecuted to a final decree and the corporation can be placed under disabilities and then an order can be made dissolving the corporation precisely as has been done in this case, without administering any assets and without there being any assets capable of administration by this court * * *. In this connection it is worth while to note that, according to the well-settled doctrine of this court, while this suit is an action inter partes, down to the time for the decree for an injunction, it then ceases to be an action *inter partes* the complainant no longer controls the cause, and the stockholders and creditors have to be brought in * * *. Very many of our chancellors have remarked—I think, certainly, the idea is expressed in a number of reported cases—that in fact all of the stockholders and all of the creditors constitute a single party complainant in this proceeding. This statement is based on the idea that the actor who originates the proceeding is not acting in a private capacity merely coming into court with his own private grievance as a creditor and seeking a means of collecting his debt. Nor is he acting on his own behalf and as the representative of creditors with a common grievance which such creditors, as a class, have against the defaulting debtor corporation. Nor is he acting, in case he is a stockholder, on behalf of the stockholders as a class for the redress of any injury to the rights of such stockholders. When a corporation is hopelessly insolvent, its stockholders are interested in a variety of ways in having its activities perpetually enjoined and its assets equitably administered. In the same case creditors have a very great interest, in some respects the same bu. in others widely different from that of the stockholders. The

public at large, as has so often been pointed out, has a further distinct interest in preventing an insolvent corporation from contracting obligations and continuing its business operations in which it may deceive new parties and thereby perpetrate fraud. * * * That our statutory action against an insolvent corporation, the only essential object of which is to place the corporation under disabilities, is not in fact the personal action of the particular stockholder or creditor who is authorized to bring the action, and who may be induced to bring it from a variety of selfish motives, is illustrated by the nature of the final decree, which the actor, the creditor, we may say, obtains in his suit. He obtains no decree which necessarily benefits him personally. Nor does he obtain any decree which he owns or controls as a representative of or trustee for others. The decree, from the moment it is entered, is beyond his exclusive control and stands for the benefit of all the creditors and stockholders equally. This decree, while fixing the status of the complainant as a creditor for the purpose of qualifying him to sue, does not make it res adjudicata that he is entitled to $1. of the assets. He is obliged, after the final decree for an injunction has been obtained upon his motion and through his instrumentality, to prove his claim against the assets precisely as all the other creditors must prove their claims, and his entire claim may be rejected. He may thus utterly fail to secure the object which he had in view in bringing the suit, but the statutory object of the suit—its only legal object—is fully accomplished. There certainly seems to be grounds for arguing that the 'matter in dispute' in this suit in rem is the res, i. e., the status of the defendant corporation with respect to the exercise of its franchises, and that this 'matter in dispute' remains the same whether the complainant alleges himself to be a creditor and is inspired by the hope of

a dividend, or alleges himself to be a stockholder whose sole object in prosecuting the suit is to stop the operations of the corporation and thereby ward off a liability or an increase of liability on a stock subscription, or whatever, among numerous other possible motives, may actuate the complaining stockholder or creditor in instituting the litigation."

In *Hoopes vs. Basic Company*, 69 N. J. E., 679, at p. 685, Vice Chancellor Stevenson, again said:

"We have here not a private action inter partes. The complainant, whether he is a stockholder or a creditor, acts as the representative of the public, and particularly of the whole body of stockholders and creditors of the corporation. It is a great mistake to suppose that this is a collection suit or a creditor's suit. The complainant, if he is a creditor, by his decree whether he is a creditor or stockholder—by his decree against the corporation resulting in its being wound up and its assets being distributed—gets nothing necessarily advantageous to himself. He is obliged, afterwards, to come humbly before the receiver and prove his claim, and it may be rejected, and he may never have any share awarded to him in the assets, and that fact, as I have pointed out in this case, very strongly indicates that Chancellor Williamson and Chancellor Vroom were entirely right in saying that this is an action in which not the particular grievance of the complainant is redressed, but the grievance of the public including the whole body of stockholders and creditors."

In *Pierce vs. Old Dominion &c. Smelting Co.*, 67 N. J. E., 399 the Vice Chancellor refers to the action as an equitable *quo warranto*. He says at page 405:

"How widely our statutory proceeding dif-

fers from a mere creditor's suit to collect money was indicated over fifty years ago by Chancellor Benjamin Williamson, in one of the earliest cases which dealt with the nature of the remedy provided by our statute. *Rawnsley v. Trenton Mutual Life Insurance Co.*, 9 N. J. E. 95. The Chancellor says (at page 96): 'Where a creditor or stockholder comes into court under this act, it is not his particular grievance the court is to redress or his individual interest that is to be protected, but the very object of the act is to protect the public at large from imposition, and to promote and secure the general interest of the stockholders and creditors.' This statement clearly shows that beyond the collection of overdue debts our statutory action is aimed to secure those objects which are ordinarily attained by a *quo warranto* action in a common law court. The reference in the statute to the 'safety of the public' points in the same direction."

He further said: "It has often been said that our statutory action is in the nature of a suit in *rem*. This description is correct, because the decree fixes the status of the corporation with respect to the exercise of its franchises as against the whole world. *Albert vs. Clarendon Land &c. Co.*, 53 N. J. E., 625."

The case of *Hoopes vs. Basic Co.* heretofore adverted to, in which case Vice Chancellor Stevenson referred to his opinion in *Gallagher vs. Asphalt Co.* heretofore referred to, and also to his opinion in *Pierce vs. Old Dominion Smelting Co.*, was affirmed in the Court of Errors and Appeals by the unanimous vote of that court for the reasons stated in the opinion of Vice Chancellor Stevenson, 72 N. J. E., 426.

In *Michel vs. William Necker, Inc.*, 106 Atl. p. 449, at p. 450, Vice Chancellor Lane said, referring to the statutory procedure hereinbefore adverted to:

"The statutory procedure is in the nature of an equitable *quo warranto*. It is in the nature of a probate proceeding. It is a winding up of the affairs of a deceased corporation through the statutory agent, just as a probate proceeding is a winding up of the affairs of a deceased individual through an agent authorized by statute. A decree of dissolution, actually killing the corporation, may be entered at any time after the appointment of a receiver. The corporation, indeed, may be considered dead after the award of the statutory injunction, although it may be revived by proceedings under the sixty-ninth section."

11. Your petitioner further shows that upon the proceedings under the statute being instituted and prosecuted and upon the appointment of the receiver, the matters affecting the administration of the affairs of the corporation and the rights of its creditors and stockholders are drawn into such suit; that when the statutory procedure is set in motion it takes precedence of any actions theretofore commenced against the corporation for administration or otherwise, and the rights of all parties must be settled in the proceedings under the statute; that if there is a general administration suit, under the trust fund theory, pending in the Court of Chancery prior to the institution of proceedings under the statute that suit is superseded. (See *Morse vs. Metropolitan Steamship Co.* 87 N. J. E., 217, 100 Atl. 219 as an example.)

12. That the suit pending in the United States District Court at the time of the institution of the proceedings under the statute which resulted in the appointment of your petitioner was a suit brought by a creditor for the purpose of administering the affairs of the corporation as a trust estate; it was in no sense a suit under the statute;

that complainants in that suit went into the federal court to enforce their rights because they were non-residents, but your petitioner shows that complainants can enforce no rights which they do not have under the state law; that their rights are measured by the law of the state; that if a suit were pending in the federal court against an individual and that individual died before judgment there could be no doubt but that the adverse suitor would be bound by the state law with respect to the administration of the estate of deceased, and your petitioner asserts that the Court of Chancery, a court of competent jurisdiction, having taken over the administration of the affairs of the defendant corporation, William Necker, Inc., under the statute in a proceeding akin to probate proceedings, having in effect killed the defendant, deprived it of the power to exercise any of its rights, or of its power to appear in the federal court proceedings, the proceedings in the federal court are superseded and that court holds custody of the assets (to which your petitioner as a receiver appointed under the statute representing the corporation and its creditors and stockholders is entitled) only for the purpose of securing compensation to its receiver and officers, just as in case bankruptcy proceedings are instituted after the appointment of the statutory receiver by the court of chancery it has been held that that court holds custody of the assets (to which the trustee is entitled) only for the purpose of securing compensation to the receiver and the payment of administration expenses. Your petitioner asserts that the moment the statutory receiver is appointed he represents creditors and stockholders, and all creditors and stockholders resident or non-resident, including the complainants in the suit pending in the United States

District Court. Your petitioner refers to the opinions of the Supreme Court of the State of New York in the case of *People vs. New York City Railway Co.*, 57 Misc. Rep. 130, 107 N. Y. Supp. 257, in which case the Supreme Court of New York in proceedings instituted under the statute of the State of New York similar in nature to the statute of this state (except that the proceedings under the New York Statute must be instituted by the attorney general), appointed receivers of corporations, the administration of whose affairs had been taken over by the federal court in equity administration suits, and reached the conclusion upon authorities cited by it that the federal court upon the intervention of said receivers would release its control of the assets. Your petitioner also refers to the opinion of Vice Chancellor Lane in *Hitchcock vs. American Pipe and Construction Company,* 105 Atl. 655 with respect to the nature of the proceedings under the statute, and to the opinion of Vice Chancellor Stevenson in *Elm vs. International Steam Pump Company* therein referred to. The order made by Vice Chancellor Lane in *Hitchcock vs. American Pipe and Construction Company* case was reversed by the Court of Errors and Appeals upon the ground that the court of chancery has no power under the circumstances to award a counsel fee, but without criticism of the remarks of the Vice Chancellor with respect to the nature of the proceedings.

13. Your petitioner further shows that the Honorable J. Warren Davis, Judge of the United States District Court, in denying the application of your petitioner made to him to wind up the administration of the affairs of the corporation in the federal court and turn over the assets, after paying the receiver's and other expenses to your

petitioner, handed down an opinion heretofore adverted to and made a part hereof.

14. Your petitioner respectfully asserts that the opinion of the learned judge with respect to the nature of the proceedings under the statute is in direct conflict with all of the judicial opinions and with the established rule of the courts of highest jurisdiction in the State of New Jersey. That the matter is one of local practice and the federal courts are bound by the construction placed upon the statutory proceedings by the state courts; that the learned judge of the District Court has likened the proceedings under the statute of the State of New Jersey to an ordinary creditor's suit; that he has, in fact, held that the creditor comes into the court of chancery to assert a private right; that any defenses which may be asserted against the actor in the proceedings in the Court of Chancery may be asserted against the receiver; that in other words the proceedings under the statute are of the same nature as the proceedings pending in the federal court, and therefore do not supersede the proceedings pending in the federal court. Your petitioner respectfully asserts that the finding of the learned District Judge is in direct conflict with every opinion of the courts of the state of New Jersey; that there is no opinion of any judicial officer of the State of New Jersey which lends any support whatever to his conclusion.

15. Your petitioner is informed and believes and avers that the proper practice to secure a review of the refusal of the said United States District Court to comply with the request of your petitioner is to apply to this Court for a writ of mandamus, or in the alternative, a writ of prohibition as herein applied for. There is no appeal from the order of the District Court.

That the said United States District Court has declined to admit your petitioner as representing the corporation and all of its creditors and stockholders and has declined to consider your petitioner as having the attributes given to him under the provisions of the statute of the State of New Jersey hereinbefore referred to; that the said United States District Court is now administering and will proceed to administer the affairs of the said corporation without regard to the rights of your petitioner and as if your petitioner had not been appointed and as if no proceedings had been taken in the Court of Chancery of the State of New Jersey; that your petitioner is enjoined from interfering with the assets and property of the said William Necker, Inc., of which said assets and property your petitioner has been appointed receiver, and your petitioner is interfered with in the administration of his trust under appointment of the Chancellor of the State of New Jersey; that unless this court shall intervene the United States District Court will, without notice to your petitioner, and in proceedings in which the said United States District Court will not permit your petitioner to intervene, distribute the assets of the said corporation without regard to the rights of your petitioner and the application of the provisions of the statute of the State of New Jersey.

Wherefore your petitioner prays, that a rule be made and issue from this Honorable Court, directed to the said Honorable J. Warren Davis, District Judge of the United States, for the District of New Jersey, and the said District Court of the United States, for the District of New Jersey, to show cause why a writ of mandamus should not issue, commanding the said Judge and the said Court and each of them to proceed to fix the fees

of the receiver appointed by the United States District Court for the District of New Jersey, and the expenses of administration and directing the delivery to your petitioner, the receiver appointed by the Chancellor of the State of New Jersey, of the assets of said corporation now in the hands of the Federal receiver, after the said federal receiver shall have been compensated and administration expenses paid or provided for, and to direct the funds less the proceeds of the administration in the Federal Court to be paid over to the receiver appointed by the Court of Chancery of the State of New Jersey, after, however, the fees and expenses of the Federal receiver and administration expenses be paid, or in the alternative that a writ of prohibition may issue from this Honorable Court, prohibiting the said Honorable J. Warren Davis, District Judge of the United States, for the District of New Jersey, and prohibiting said District Court of the United States, for the District of New Jersey, from taking any further proceedings in connection with said receivership except only to fix the fees of the receiver and the administration expenses and directing their payment, and to direct the delivery of the assets in the hands of the federal receiver and the payment of any funds in the hands of the federal receiver after the expenses of administration in the federal court shall have been paid, to the receiver appointed by the Court of Chancery of the State of New Jersey, and for such other and further relief in the premises as shall seem just and meet.

And your petitioner will ever pray, &c.

DOUGAL HERR,
Attorney of and of Counsel with Petitioner.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

J. Raymond Tiffany, of full age being duly sworn according to law upon his oath deposes and says:

I am the petitioner above named; the foregoing petition is true of my own knowledge.

Sworn and subscribed to before me }
this 1st day of November, 1919. }

J. RAYMOND TIFFANY.

Anna L. Toggi,
Notary Public of New Jersey.

SCHEDULE A.

Bill of Complaint.

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF NEW JERSEY.

Between FREDERICK KESSLER *et als*, *Complainants*, *and* WILLIAM NECKER, INC., *Defendant*.	In Equity. On Bill etc.

To the Honorable The Judges of the District Court of the United States for the District of New Jersey:

Humbly complaining unto your Honors, your orators, Frederick Kessler, Frieda Kessler, Isaac Kraus, Theresa McCormack and John C. Hitchman who bring this their suit on their own behalf and on behalf of all other creditors and stockholders of William Necker, Inc. who may desire to join in the prosecution of the same, show that:

1. Your orators are residents and citizens of the State of New York, and the defendant, William Necker, Inc. is a body corporate created and existing under and by virtue of the laws of the State of New Jersey and is a citizen of said State of New Jersey, resident in the District of New Jersey.

2. This is a civil suit in the nature of a claim in equity and presents a controversy between citizens and residents of different states of the

United States, and the amount in controversy exceeds, exclusive of interest and costs, the amount of three thousand ($3,000) Dollars.

3. The defendant is a body corporate organized for the purpose of carrying on a general undertaking, burial and funeral furnishing business, to act as embalmers, funeral directors, liverymen, owners of or agents for cemeteries, burial grounds, crematories and mortuary chapels, and is now actually and actively engaged in the business the purposes of which have heretofore just been set out. It has an authorized capital stock of one million dollars divided into one hundred thousand (100,000) shares each of the par value of ten ($10.00) dollars. Of such capital stock thirty thousand (30,000) shares is preferred stock and the balance thereof, namely, seventy thousand (70,000) shares is common stock. Of the stock thus authorized to be issued there has been issued and is now outstanding, eighteen thousand six hundred seventy-seven (18,677) shares of preferred stock and ten thousand (10,000) shares of common stock, or a total issue of twenty-eight thousand six hundred and seventy-seven (28,677) shares of stock.

4. The Board of Directors of said William Necker, Inc. up to the 12th day of September, A. D. 1916 consisted of William Necker, Charles Singer, Jr., Thomas McClelland, Charles Neilson, Thomas Henry, George Limouze and J. Emil Walschied. William Necker up to that time was president and treasurer of said corporation, George Limouze was vice-president, and Charles Singer, Jr. was secretary thereof.

5. On September 12th, 1916 William Necker died and since then said Board of Directors has consisted of the remainder of the persons herein-

before named, and George Limouze has been acting as president and treasurer of said corporation, taking the place of said William Necker.

6. Your orators, Frederick Kessler and Frieda Kessler reside at No. 421 East 157th Street in the City of New York in the State of New York and together own one hundred shares of the preferred stock of William Necker, Inc. each share of the par value of ten dollars; your orator, Isaac Kraus resides at No. 3 West 113th Street in the City of New York, State of New York and owns one hundred shares of the preferred stock of William Necker, Inc., each share of the par value of ten dollars; your oratrix Theresa McCormack resides at No. 303 East 157th Street in the City of New York in the State of New York, and owns fifty shares of the preferred stock of William Necker, Inc. each share of the par value of ten dollars, and your orator John C. Hitchman, who is a creditor of William Necker, Inc. and to whom said defendant is indebted in the sum of Eight hundred and fifty-four dollars for rent resides at No. 497 East 138th Street in the City of New York in the State of New York, and all of your orators are citizens of the State of New York.

7. The defendant company was organized in the year 1914 for the purpose of taking over as a going concern the undertaking business then carried on by William Necker in the Town of Union, County of Hudson and State of New Jersey, and in the surrounding territory. This business was taken over and then was and now is the largest undertaking business in the world. It consists of a main office, factory, crematory, stables and garage located in the Town of Union, and twenty-six branch offices located in the Counties of Union, Essex, Hudson, Bergen and Passaic

in the State of New Jersey and in various portions of the Greater City of New York in the State of New York. The defendant as successor of William Necker individually, during the year 1915, conducted upwards of five thousand funerals and cremations and during the year 1916 has conducted over twenty--five hundred funerals and cremations from its main office and its various branches. The property of the company consists of lands and buildings, horse drawn vehicles, horses, office and store fixtures, harness, mortgages receivable, accounts receivable and various other assets. Its main real estate holdings are located on the southwest corner of Bergenline Avenue and Main Street in the Town of Union aforesaid. The buildings there located contain the main executive offices of the company, a casket factory, a casket depository, an automobile department containing upwards of forty automobiles, a horse drawn vehicle department housing approximately seventy-five horses and upwards of fifty hearses and coaches, business and delivery wagons. According to inventories taken appraisements made and the balance sheet of the company for September 1st, 1916, the horse drawn vehicles are valued at $34,110, the automobiles at $50,052.80, the horses at $18,643.50, office and store fixtures at $56,459.85. Mortgages receivable at $18,427.71, while accounts receivable amount to the sum of $138,116.10. Of this last mentioned sum there has been charged off for doubtful accounts the sum of $36,736.93 while land and buildings are worth $223,162.00. The total gross assets of the company as of September 1st, 1916, according to said balance sheet, amount to $581,379.10, while liabilities of the defendant exclusive of liability on stock issued and outstanding amounts to the

sum of $294,808.40. Of this sum $107,772.41 is due upon mortgages upon real estate while $187,086.07 is due upon bills payable to banks, bills payable for merchandise and accounts payable.

8. The defendant company is well and favorably known in the State of New Jersey and in the Greater City of New York in the State of New York. It has spent thousands of dollars in advertising the services which it renders and has thereby acquired a good will which is of inestimable value. It maintains a cremation plant at the main office in the Town of Union where cremations are conducted daily. It has brought together and organized a highly efficient body of skilled employes and is now possessed of a business organization and of good will of great value over and above the material assets hereinbefore enumerated, which value would however immediately disappear upon the disruption of the business of the company.

9. Prior to September 12th, 1916 the business of the defendant company was conducted almost exclusively by the late William Necker who was its president and its treasurer and its guiding spirit and the death of said Necker has, as your orators are informed and verily believe, made necessary a re-organization of the affairs of the company and re-adjustment of its forces which can only be gradually accomplished and must extend over a long period of time. The death of William Necker, as your orators are informed and believe, has also seriously affected the immediate credit of the company and many of the creditors of the company have instituted suits, some in the State of New York by attachment proceedings, others in the State of New Jersey by summons and complaint. A large part of the current indebtedness consisting of bills payable at banks

bills payable for merchandise, and the general accounts payable is now over due or will shortly be growing due, and the creditors holding these claims are pressing for payment while the defendant is at the present time unable to pay these claims without withdrawing from its business the funds constantly needed to meet labor and other immediate current necessities, and it is certain that if judgments are recovered against the defendant upon the suits already instituted, other creditors holding over-due claims against the defendant will also vigorously prosecute their claims of judgment. The defendant is therefor threatened with judgments upon the suits already instituted and with further suits at the instance of other creditors and with numerous execution sales, all of which will necessarily result in the disruption and suspension of its business, the destruction of its good will, and of its business organization, the dissipation and shrinkage of its assets, to the great detriment of all of the creditors and stockholders.

11. And your orators further show that they are informed and verily believe that the mortgages now a lien upon the real estate of the defendant are all past due and open mortgages.

12. Your orators are informed and verily believe that the financial difficulties of the defendant are only temporary in their nature and can and probably will be overcome if the defendant can for a limited period be relieved of pressure from its matured and maturing obligations and its assets protected against disruption and waste through forced levies and sales, and its good will and its organization preserved by a limited continuance of the business under the direction of some competent court of equitable jurisdiction, that the directors of said defendant or some of

them and the widow of the said William Necker are willing to extend credit to and procure credit for the defendant if they can be assured of the further continued existence of said business, but that they dare not do so if defendant is to be subjected to the pressure of an attack upon its assets by all of the creditors of the Company now holding matured or maturing obligations and claims against the same.

13. Your orators further show and charge that all of the assets of said defendant are a trust fund in which complainants and the other stockholders and creditors of the defendant are interested and that the officers and directors of said company have become unable to further discharge the duties of their trust in the protection and administration of the assets and business of the company, and that unless jurisdiction is taken by your Honors or some other court of equitable jurisdiction, there will be immediately precipitated unnecessary and wasteful strife and controversy among the creditors of the defendant, resulting in the inevitable destruction of the business organization and good will of the defendant and the destruction and waste of its assets.

To the end, therefor, that the said defendant may make answer to all and singular the premises as fully as though here repeated and that the claim and interest of your orator in the premises as well as that of all other creditors and stockholders may be ascertained and determined and the assets of said defendant corporation marshaled and the liens and priorities of all parties in interest therein determined and adjudged and the several creditors of said corporation enjoined and restrained from dissipating said assets through their several and individual demands, suits or levies and that the assets of said corporation may

be administered as a trust fund for the benefit of your orator and all others having an interest therein, and that it may be adjudged and determined that said business has been and is being conducted at a loss and in a manner greatly prejudicial to the interest of its stockholders and that a Receiver or Receivers may be appointed to take charge of the property, business and assets of said corporation, with power to continue the same and with such other powers and authority as may be permitted by law and directed by the Court; and

May it please your Honors, the premises considered, to grant unto your orators the writ of injunction issuing in due form of law to said William Necker, Inc., restraining it and its officers and agents from further exercising its franchises and from collecting or receiving any of its debts due to it or paying out, selling, assigning or transferring any of its estate, moneys, funds lands tenements or effects except to a Receiver or Receivers appointed by the Court; and also the writ of subpoena likewise issuing in due form, commanding the said defendant to be and appear before your Honors in this Court by a certain day and under a certain penalty to abide by and perform such order and decree herein as to your Honors shall seem meet.

And your orator will ever pray, etc.

EDWARD HOLLANDER,
Sol'r and Of Counsel with Complainants.

STATE OF NEW JERSEY,
County of Hudson. } ss.:

Charles Singer, Jr. of full age, being first duly sworn, upon his oath deposes and says:

I reside at 209 Fulton Street, in the Town of Union, in the County of Hudson aforesaid and I

am personally acquainted with the complainant named in the foregoing bill of complaint and I know that Frederick Kessler and Frieda Kessler together own one hundred shares of the preferred stock of William Necker, Inc.; that Isaac Kraus owns one hundred shares of said preferred stock; that Theresa McCormack owns fifty shares of said preferred stock and that John C. Hitchman is a creditor of William Necker, Inc., to whom said corporation is indebted in the sum of eight hundred and fifty-four dollars for rent and that all of the persons just named reside in the City and State of New York at the addresses mentioned in the foregoing bill of complaint. I also know that the preferred stock of William Necker, Inc., has a par value of ten dollars per share. I also know that all of said persons are citizens of the State of New York.

I have carefully read the bill of complaint hereto attached and know that the things therein set forth are true. I am secretary of William Necker, Inc., the defendant named in said bill of complaint. The defendant is a body corporate organized for the purpose of carrying out a general undertaking, burial and funeral furnishing business, to act as embalmers, funeral directors, liverymen, owners of or agents for cemeteries, burial grounds, crematories and mortuary chapels and is now actually engaged in the business the purposes of which I have just mentioned.

The defendant, William Necker, Inc., is a corporation of the State of New Jersey and is resident of the District of New Jersey. It has an authorized capital stock of one million dollars divided into one hundred thousand (100,000) shares each of the par value of Ten ($10.00) Dollars. Of the capital stock thus authorized thirty thousand (30,000) shares is preferred stock

and seventy thousand (70,000) shares is common stock. There has been issued by William Necker, Inc., and is now outstanding eighteen thousand six hundred seventy-seven (18,677) shares of preferred stock and ten thousand (10,000) shares of common stock.

The Board of Directors of William Necker, Inc., up to the 12th day of September, 1916, consisted of William Necker, Thomas McClelland, Charles Neilson, Thomas Henry, George Limouze, Charles Singer, Jr. and J. Emil Walscheid. William Necker then was the president and treasurer of said Company, George Limouze was its vice-president and I. Charles Singer, Jr. was secretary. William Necker died on September 12th, 1916 and since then said Board of Directors has consisted of the remainder of the persons hereinbefore named and George Limouze has acted as president and treasurer while I have continued to act as secretary of the company.

The company was organized in the year 1914 for the purpose of taking over as a going concern the undertaking business then carried on by William Necker in the Town of Union, County of Hudson as aforesaid and in the surrounding territory. This business was then taken over and then was and now is the largest undertaking business in the world. It consists of a main office, factory, crematory, stables and garage, located in the Town of Union and twenty-six branch offices in Union, Essex, Hudson, Bergen and Passaic Counties in New Jersey and in various portions of the Greater City of New York in the State of New York.

William Necker, Inc., during the year 1915 conducted upwards of five thousand funerals and cremations and during the year 1916 has conducted over twenty-five hundred funerals and crema-

tions from its main office and its various branches. The property of the company consists of land and buildings, horse drawn vehicles, horses, office and store fixtures, harness, mortgages receivable, accounts receivable and various other assets. Its main real estate holdings are located on the southwest corner of Bergenline Avenue and Main Street in the Town of Union aforesaid. The buildings there located contain the main executive offices of the company, a casket factory, a casket depository, an automobile department containing upwards of forty automobiles, a horse drawn vehicle department housing approximately seventy-five horses and upwards of fifty hearses and coaches, business and delivery wagons. According to inventories taken, appraisements made and the balance sheet of the company for September 1st, 1916, the horse drawn vehicles are valued at $34,110, the automobiles at $50,052.80, the horses at $18,643.50, office and store fixtures at $56,459.85. Mortgages receivable at $18,427.71, while accounts receivable amount to the sum of $138,116.10. Of this last mentioned sum there has been charged off for doubtful accounts the sum of $36,736.93 while land and buildings are worth $223,162.00. The total gross assets of the company as of September 1st, 1916 according to said balance sheet, amount to $581,379.10, while liabilities of the defendant exclusive of liability on stock issued and outstanding amounts to the sum of $294,808.40. Of this sum $107,772.41 is due upon mortgages upon the real estate whole $187,086.07 is due upon bills payable to banks bills payable for merchandise and accounts payable.

William Necker, Inc., is well and favorably known in the State of New Jersey and in the Greater City of New York in the State of New

York. It has spent thousands of dollars in advertising the services which it renders and has thereby acquired a good will which is of inestimable value. It maintains a cremation plant at the main office in the Town of Union where cremations are conducted daily. It has brought together and organized a highly efficient body of skilled employees and is now possessed of a business organization and of good will of great value over and above the material assets hereinbefore enumerated, which value would however immediately disappear upon the disruption of the business of the company.

Prior to September 12th, 1916, the business of William Necker, Inc., was conducted almost exclusively by the late William Necker who was its president and its treasurer and its guiding spirit and the death of said Necker has made necessary a reorganization of the affairs of the company and readjudgment of its forces which can only be gradually accomplished and must extend over a long period of time. The death of William Necker has also seriously affected the immediate credit of the company and many of the creditors of the company have instituted suits some in the State of New York by attachment proceedings, others in the State of New Jersey by summons and complaint. A large part of the current indebtedness consisting of bills payable at banks, bills payable for merchandise, and the general accounts payable is now overdue or will shortly be growing due, and the creditors holding these claims are pressing for payment while the company is at the present time unable to pay these claims without withdrawing from its business the funds constantly needed to meet labor and other immediate current necessities and it is certain that if judgments are recovered against

the company upon the suits already instituted, other creditors holding overdue claims against William Necker, Inc., will also vigorously prosecute their claims to judgment. The company is therefor threatened with judgments upon the suits already instituted and with further suits at the instance of other creditors and with numerous execution sales, all of which will necessarily result in the disruption and suspension of its business, the destruction of its good will, and of its business organization, the dissipation and shrinkage of its assets, to the great detriment of all of the creditors and stockholders.

The mortgage now a lien upon the real estate of William Necker, Inc., are all past due and open mortgages.

The financial difficulties of William Necker, Inc., are in my opinion, however, only temporary in their nature and can and probably will be overcome if the company can for a limited period be relieved of pressure from its matured and maturing obligations and its assets protected against disruption and waste through forced levies and sales and its good will and its organization preserved by a limited continuance of the business under the direction of some competent court of equitable jurisdiction; and the directors of the company, or some of them, and the widow of the said William Necker are willing to extend credit to and procure credit for the company if they can be assured of the further continued existence of said business, but they dare not do so if the company is to be subjected to the pressure of an attack upon its assets by all of the creditors of the company now holding matured or maturing obligations and claims against the same, which attack can only result in the financial collapse of

the company to the great detriment and loss of all the creditors and stockholders.

CHAS. SINGER, JR.

Sworn and subscribed to before me this 30th day of September, 1916.

Henry Vogler,
Master in Chancery of New Jersey.

Answer.

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF NEW JERSEY.

Between FREDERICK KESSLER, *et als.*, *Complainants,* *and* WILLIAM NECKER, INC., *Defendant.*	In Equity. On Bill, etc.

William Necker, Inc., a New Jersey corporation, the defendant in this cause, for answer to the bill of complaint herein, or unto so much and such parts thereof as the defendant is advised it is necessary and material for this defendant to make answer unto, answering says:

1st. The defendant admits the allegations of the bill of complaint.

2nd. The defendant, reiterating the admission of the preceding paragraph of this answer, joins in the prayer of said bill of complaint and prays that this court, sitting in equity, may take possession of all of the property and business of the defendant through the appointment of a receiver or receivers as prayed in said bill of complaint,

and thereby preserve the unity and continuity of operation of said business and property of the defendant as they have been maintained and operated; and protect and preserve its said business and property from being sacrificed under any proceedings which can or may be taken liable to prejudice or sacrifice the same; and do any and all acts which may be necessary to preserve the valuable rights, business and property of the defendant, and it accordingly prays that, inasmuch as there is no adequate remedy at law in the premises for the complainants or for this defendant, that this court will, for the purposes aforesaid, appoint a receiver or receivers as prayed for in said bill of complaint, and empower and authorize such receiver or receivers to take possession of the business and property of this defendant, and to preserve, manage and operate the same pay all indebtedness due or to become due by this defendant, and otherwise discharge the duties ordinarily imposed by courts upon receivers in similar cases; that on the final hearing in this cause this court will under said bill of complaint, and this answer, or such supplemental pleadings as may be filed herein, make such decree or decrees with respect to the property and business of this defendant as shall deal with the same on general equitable principles, and that this court will cause all the liens upon said property or any part thereof and all rights and claims in equity of persons interested therein to be ascertained, defined and determined; and that the proceeds arising from the sale of said property or any part thereof be applied under the said orders or decrees of this court according to the rights, interests and equities of the parties interested therein; and that this court direct all persons in possession of the property of this defendant or any

part thereof to surrender the same to such receiver or receivers, or to hold such property under said receiver or receivers.

WILLIAM NECKER, INC.
By George Limouze,
Vice-President.

(L. S.)
Attest:
Charles Singer, Jr.,
Secretary.

J. Emil Walscheid,
Solicitor for Defendant.

STATE OF NEW JERSEY, }
County of Hudson. }

George Limouze, of full age, being first duly sworn, says: I am the Vice-President of the defendant company. I have read the foregoing answer and know the contents thereof; and know that said answer is true to my own knowledge except to the matters therein stated to be alleged on information and belief and as to those matters I believe it to be true.

GEORGE LIMOUZE.

Subscribed and sworn to before me }
this 30th day of September, 1916. }
Henry Vogler,
Master in Chancery of N. J.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

The answer of the defendant was taken this 30th day of September A. D. 1916 before me, the undersigned under the common seal of the said corporation as by this said seal hereto annexed appears.

Henry Vogler,
Master in Chancery,
of N. J.

Filed Sept. 30, 1916 at 1 P. M.

SCHEDULE B.

Order of United States District Court Appointing Receiver.

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF NEW JERSEY

Between FREDERICK KESSLER, *et als.*, *Complainants*, *and* WILLIAM NECKER, INC., *Defendant.*	In Equity On Bill, etc.

This matter being opened to the court by Edward Hollander, solicitor of and of counsel with complainants, and in the presence of J. Emil Walscheid, solicitor of and of counsel with defendant, upon an application for the appointment of a receiver pendente lite, and the bill of complaint with the affidavit thereto attached and the answer of the defendant company having been read and the arguments of counsel having been heard, it is now on this 30th day of September, A. D. 1916,

Ordered, adjudged and decreed that Thomas F. Martin be and he is hereby appointed temporary receiver of the defendant, William Necker, Inc., and of all the property of the said defendant, real, personal and mixed, of whatsoever kind and description, and wheresoever situate, including the business now conducted by it, and all the lands, buildings, premises and property owned, leased or operated by it, and all furniture, fixtures, materials and supplies, books of account, records and

other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, muniments of title, bills and accounts receivable, rents, issues, profits and income accruing and to accrue, as well as all interest, easements, privileges and franchises, and all assets of every kind; that the said receiver be and he hereby is authorized immediately to take possession of the same and run, manage and operate the business heretofore conducted by the defendant, said William Necker, Inc., and the premises and property, in such manner as will, in his judgment, produce most satisfactory results, so that the operation of the said business of the defendant company shall until the further order of this court be continued in the same manner as at present or in an economical manner, and in the best interests of the creditors and stockholders of the defendant company; and to exercise the authority and franchises of the defendant; and to preserve and protect its property and business; and to protect the title and possession, and secure and continue the business of the same; and in his discretion to employ and discharge and fix the compensation of all officers, attorneys, managers, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing; that the said receiver be and he hereby is authorized to collect rents, income and profits of any real property, to make appropriate payments therefrom on account of accruing interest on mortgages, taxes, and other necessary charges and also so far as may be needful to pay off current necessities for labor and supplies; and the said receiver is hereby authorized and empowered to purchase such additional materials as he in his judgment may

deem necessary for the proper continuance of said business of the defendant and to pay therefor; and to issue receiver's certificates for the purpose of raising money for the continuance of said business, in such sum as may hereafter be authorized by order of this court; and the said receiver is hereby authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment for the proper protection of the property, business and trust hereby reposed in him, and likewise to defend all actions instituted against him as receiver, or against said company and also to appear in and conduct the prosecution or defense of any actions or suits now pending in any court wherein this defendant is a party, the prosecution or defense of which will, in the judgment of said receiver, be necessary for the proper protection of the property placed in his charge, or the interests and rights of stockholders and creditors connected therewith; and the said receiver is hereby authorized in his discretion, from time to time, out of the funds coming into his hands, to pay the expenses of operating said property and business and executing his trust.

The said receiver is hereby ordered to open proper books of account wherein shall be stated the earnings, expenses, receipts and disbursements of his said trust, and preserve proper vouchers for all payments made by him on account thereof; and the said receiver is hereby further authorized and directed to employ such agents, attorneys and servants as may be necessary for the proper discharge of his duties as such receiver.

And it is further ordered that a bond of said receiver in the sum of Forty ($40,000) Thousand Dollars conditioned that he will well and truly perform the duties of his office and duly account

for all moneys or property which may come into his hands, and abide and perform all things which he shall be directed to do, with sufficient sureties, to be approved by a Judge of this court, be forthwith filed in the office of the Clerk of this court.

And it is hereby further ordered that each and every of the officers, directors, agents and employes of the defendant, William Necker, Inc., and all other persons whomsoever, be and they hereby are required and commanded forthwith upon demand of the said receiver or his duly authorized agent or agents to turn over and deliver to said receiver or his duly constituted representatives any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes accounts, moneys, or other property in his and their hands or under his or their control; and each of said directors, officers, agents and employes is hereby commanded and required to obey and perform such orders as may be given to them from time to time by the said receiver or his duly constituted representative, in conducting the operation and management of the property of the defendant company.

And it is further ordered that the said defendant, William Necker, Inc., and its officers, directors, agents and employes, and all other persons claiming to act by, through or under the defendant, and all other persons whomsoever, be and they hereby are enjoined from interfering in any way with the possession or management of any part of the property over which the receiver is hereby appointed, or interfering in any way to prevent the discharge of his duties, or his managing and operating the business and property of the defendant, and from instituting or prosecuting any suits or actions against the defendant company or against the receiver without leave of

the court; and any party in interest may apply for further directions.

And it is further ordered that the parties hereto show cause before this court at the United States Post-Office Building in the City of Trenton, New Jersey on the 16th of October, 1916, at ten-thirty o'clock in the forenoon of said day, why said receivership should not be continued during the pendency of this suit, and upon the hearing thereof any other creditor or stockholder of the defendant, or other party in interest, may be heard.

Dated, Trenton, N. J. Sept. 30th, 1916.

J. WARREN DAVIS,
United States District Judge.

A true copy.

THOMAS F. MARTIN,
Receiver of Wm. Necker, Inc.

Order Continuing Receiver.

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF NEW JERSEY.

Between FREDERICK KESSLER *et als.*, *Complainants,* *and* WILLIAM NECKER, INC., *Defendant.*	In Equity. On Bill, etc.

This matter being opened to the Court by Edward Hollander, solicitor of and of counsel with complainants, and it appearing that Thomas F. Martin was on the 30th day of September, A. D. 1916, appointed receiver of the defendant, William Necker, Inc., and that in and by the order ap-

pointing the said Thomas F. Martin it was ordered that the parties to this suit show cause before this court at the United States Post Office Building in the City of Trenton, New Jersey, on the 16th day of October, A. D. 1916, at ten thirty o'clock in the forenoon of said day why said receivership should not be continued during the pendency of this suit and that any other creditor or stockholder of the defendant or other party in interest might be heard upon said hearing; and it further appearing that said hearing was on the said 16th day of October, 1916, by the court adjourned to the 23rd day of October, 1916, at the same time and place; and said matter now coming on to be heard and none of the parties to this suit or any of the creditors or stockholders of the defendant, William Necker, Inc., or any other parties in interest appearing to oppose the continuance of the said receiver, during the pendency of this suit, it is now, on this 23rd day of October, A. D. 1916, upon motion of Edward Hollander, of counsel with complainants,

Ordered, adjudged and decreed that the said Thomas F. Martin be and he hereby is confirmed and continued as receiver of the defendant, William Necker, Inc., during the pendency of this suit, with all of the rights powers and duties laid down and imposed in and by the original order appointing the said Thomas F. Martin, made on the 30th day of September, A. D. 1916.

J. WARREN DAVIS,
Judge.

SCHEDULE C.

Bill of Complaint—Court of Chancery.

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainants, Frederick Michel and George Rank co-partners trading as Michel and Rank, of the Town of Union, County of Hudson and State of New Jersey, on behalf of themselves and all other creditors and stockholders of William Necker, Inc., who shall come in and contribute to the expense of this suit, respectfully show:

1. Complainants, as a copartnership as aforesaid, are creditors of William Necker, Inc., one of the defendants herein, said debt being $4,878.34 in amount, unsecured, and having arisen prior to October 1, 1916. No part of said debt has been paid.

2. The said William Necker, Inc., is a corporation created by and existing under the laws of the State of New Jersey, having its principal office in the Town of Union aforesaid. It was incorporated on the sixteenth day of March, 1914, for the purpose of carrying on a general undertaking, burial and funeral furnishing business; to act as embalmers, funeral directors, liverymen, owners of or agents for cemeteries, burial grounds crematories and mortuary chapels, and for other purposes, as set forth in the articles of incorporation, a true copy of which is attached hereto and made a part hereof and marked "Schedule A". The authorized capital stock of said corporation was one million dollars, divided into one hundred thousand shares of a par value of ten dollars each. Of such capital stock, thirty thous-

and shares were preferred stock and seventy thousand shares were common stock. Of said authorized capital stock shares to the par value of $287,525.62 were issued and are outstanding, being owned by upwards of 400 persons.

3. After its incorporation said company commenced to carry on its business in accordance with its charter and continued to conduct said business through its duly elected board of directors continuously until the 30th day of September, 1916.

4. On said 30th day of September, 1916, said company owned lands and buildings valued at $223,-162.32, tangible personal property valued at $164,-499.65, accounts receivable, after deductions for doubtful accounts, amounting to $98,485.33, mortgages receivable of $25,927.71, stock on hand valued at $43,969.02 and other property valued at $32,439.33, a total of $588,483.35. Its liabilities on said date were as follows:

Mortgages payable	$107,722.41
Bills payable, Banks	39,700.00
Bills payable, Mds.	59,821.02
Accounts payable	49,099.11
Over-drafts, &c.	15,134.02
Employee's deposits	7,115.50
Sundry Liabilities	1,969.71
Dividend payable, Wm. Necker a/c	8,865.06
Reserve for depreciation & taxes	7,053.70
Interest and rents past due	4,477.20
Total	$300,957.73
Preferred stock outstanding $187,525.62	
Common " " 100,000.00	287,525.62
	$588,483.35

5. From the date of its incorporation until the said 30th day of September, 1916, said corporation was at all times solvent, and had never ceased to carry on its business as aforesaid.

6. On said 30th day of September, 1916, Frederick Kessler, Frieda Kessler, Isaac Kraus and Theresa McCormack, stockholders of said corporation owning together 250 shares of the preferred stock thereof, of the par value of $2,500, and John C. Hitchman, a creditor of said corporation to the extent of $854.00, all of them residents of the State of New York, filed their bill of complaint in the United States District Court for the District of New Jersey (a true copy of which is hereto attached and made part hereof and marked "Schedule B"), by which it appears that said corporation while not then insolvent, was in such financial situation because of the sudden death of its president that unless temporarily protected from its creditors there was danger of the disruption and suspension of its business, the destruction of its good will and of its business organization, and the dissipation and shrinkage of its assets, to the detriment of its creditors and stockholders. Said defendant corporation filed an answer to said bill of complaint admitting all the allegations thereof and joining in the prayer. Said answer was filed on the same day as the bill of complaint. A true copy thereof is attached hereto, made a part hereof, and marked "Schedule C".

7. At a regular meeting of the directors of said corporation, held on September 22, 1916, a resolution was adopted providing that said corporation should by such answer consent to the relief sought by said bill of complaint, and instructing the officers of the corporation to execute and file such answer. A true copy of said resolution is hereto annexed, made a part hereof, and marked "Schedule D".

8. That on the said 30th day of September,

1916, the same day on which said bill and answer were filed, said United States District Court for the District of New Jersey, without notice to these complainants or to any other creditors or stockholders of said company entered a decree appointing Thomas F. Martin temporary receiver of said defendant corporation to take possession of and to run, manage and operate the property and business of the defendant, and ordering amongst other things that the officers, directors, agents and employees of the said William Necker, Inc., turn over and deliver to the receiver any and all books, papers and property of said company, in their hands or under their control, and enjoining the said company, its officers, agents, directors and employees from interfering in any way with the possession and management of said business by said receiver. A true copy of said decree is hereto attached, made a part hereof, and marked "Schedule E".

9. These complainants charge that said bill of complaint filed in the United States District Court for the District of New Jersey is in effect an appeal to said Court to substitute (at least so far as the management of the company's business is concerned) for the officers and directors contemplated by the statute under which said company was incorporated, an appointee of the court, so that, in the management of the company's business, it would be protected against suits by creditors and stockholders, and that said bill was substantially an application for the declaration of a moratorium. Said decree of said Court, based upon said bill of complaint and the consent of said corporation, amounts to an interference with the internal affairs of said corporation. Said United States District Court for the District of

New Jersey was therefore and now is without jurisdiction to entertain said bill of complaint and to make said decree, and said decree and all other proceedings in said cause are *coram non judice* and void.

10. By virtue of the premises the officers and directors of said corporation have abdicated their statutory functions and have failed to perform the duties of their trust, and ever since September 30, 1916, said corporation has been and still is managed and controlled by an officer whose acts have greatly affected the internal affairs of said corporation, as will be hereinafter set forth, but over whom the requirements of said statute, the policy of the law of this State, and the Courts of this State have had and now have no control.

11. By orders from time to time made and entered in said United States District Court for the District of New Jersey, said receiver has been continued in office and still remains as said receiver, managing said business and in possession of said property without interference by said corporation, its officers, agents or employees.

12. Said receiver has filed five reports in said United States District Court for the District of New Jersey. A true copy of each of said reports is hereto filed and made a part hereof, being marked "Schedule F", "Schedule G", "Schedule H", "Schedule I" and "Schedule J", respectively.

13. Complainants charge and submit that from the premises and from the information contained in the said receiver's reports it is evident that said corporation is now insolvent and that its business has been and is being conducted at great loss and greatly prejudicial to the interest of its creditors and stockholders, so that its busi-

ness cannot be conducted with safety to the public and advantage to the stockholders.

Complainant therefore prays:

(1) That the defendant, William Necker, Inc., may answer this bill of complaint, and each statement made therein.

(2) That said company may be decreed to be insolvent.

(3) That the Court may issue an injunction to restrain the said corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by this Court, until the Court shall otherwise order.

(4) That a receiver or receivers may be appointed for the creditors and stockholders of said corporation, with full power and authority to demand, sue for, collect, receive and take into their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description of the corporation, and to institute suits at law and in equity for the recovery of any estate, property, damages or demands existing in favor of said corporation, and in his or their discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation, and

in case of mutual dealings between the corporation and any person, to allow just set-offs in favor of such person in all cases in which the same ought to be allowed according to law and equity, and to sell, convey and assign all the said estate, rights and interests and to dispose of the proceeds thereof under the directions of this Court, and with all other powers provided by law.

(5) That the complainant and other creditors and stockholders of said company may be paid what is justly due them, and that to that end the assets of said corporation and the rights of all creditors and stockholders may be ascertained, the assets fully marshalled and administered, and the rights, liens and priorities of all creditors adjudged, determined and enforced.

(6) That complainant and such other creditors and stockholders as shall come in, may have such further relief as may be just.

(7) That a writ of subpoena may issue, commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

SMITH, MABON & HERR,
Solrs. of and of Counsel with Complainant.

"SCHEDULE A".

CERTIFICATE OF INCORPORATION
OF
WILLIAM NECKER, INC.

This is to certify, that we, William Necker, Thomas McClelland, and Charles Singer, Jr., do hereby associate ourselves into a corporation, under and by virtue of the provisions of an act

of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," and the several supplements thereto and acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite our respective names.

First: The name of the corporation is

WILLIAM NECKER, INC.

SECOND: The location of the principal office in this State is at No. 255 Bergenline Avenue, in the Town of Union, County of Hudson.

The name of the agent therein and in charge thereof, upon whom process against this corporation may be served is William Necker.

THIRD: The objects for which this corporation is formed are as follows:

(a) To carry on a general undertaking burial and funeral furnishing business; to act as embalmers, funeral directors, liverymen, owners of or agents for cemeteries, burial grounds, crematories and mortuary chapels.

To acquire the good will, business, rights, properties, and assets of all kinds and description, and to assume the whole or any part of the liabilities of any person, firm, association, or corporation engaged in the business of general undertaking as hereinbefore mentioned, and to pay for the same in cash, stock, bonds, debentures or other securities of this corporation, or otherwise as may be determined by the Board of Directors.

To acquire and take over as a going concern the general undertaking business now carried on at No. 255 Bergenline Avenue, in the Town of Union, County of Hudson, State of New Jersey, under the name of William Necker, together with all the branches of the said business and all the

assets in anywise thereunto belonging, and, in connection with the acquisition of such business, to purchase the good will and all or any of the assets and to assume all or any of the liabilities of the proprietor or proprietors of such business.

(b) To manufacture, import, purchase or otherwise acquire coffins, caskets, embalming fluid, embalming instruments, shrouds, burial clothing, mourning clothing and mourning millinery, hearses, coaches, carriages, wagons, automobiles, and to sell, dispose of, assign, transfer, trade and deal in the goods, wares and merchandise and property just described, and in any and all goods, wares, merchandise and property which may be deemed necessary and convenient for the purpose of the company's business.

(c) To take, buy, purchase, exchange, hire, lease, or otherwise acquire real estate, and property, either improved or unimproved, cemetery lands and burial grounds for the burial of the human dead, cremating and incinerating plants or establishments for the cremation or incineration of the human dead, and any interest or right therein, and to own, hold, control, maintain, manage and develop the same, in any State of the United States.

To sell, manage, improve, develop, assign, transfer, convey, lease, sub-lease, pledge or otherwise alienate or dispose of, and to mortgage or otherwise encumber the lands, buildings, real property, chattels real, and other property of the Company, real and personal, and wheresoever situate, and any and all legal and equitable rights therein.

To build, erect, construct, buy, sell, rent, lease or otherwise deal in mausoleums, tombs, sepulchres, monuments, and any and all other buildings or resting places used for the reception of the

human dead, and any and all fixtures and personal property incidental thereto or connected therewith.

(d) To buy, sell, lease, hire, manufacture, rent, store, furnish and in general to deal in automobiles, cars, carriages, coaches, hearses, wagons, trucks, vehicles and conveyances of every kind and description; and motors, machinery and equipments, mechanisms, appliances, tools and supplies of all kinds incidental thereto, and to repair, lease, hire, rent, store and furnish power to, automobiles and vehicles of every description; to manufacture, buy, sell, lease, hire, and to deal in every kind of generators, gasolene or any other substance from which power may be derived in connection with the use of such vehicles or conveyances.

(e) To carry on and conduct a general livery business; to acquire and deal in all kinds of vehicles, draft and other animals, and any other appliance or apparatus properly pertaining to such business; and in connection therewith to acquire, board and dispose of vehicles, live stock, harness and equipment.

(f) To buy, sell, import, export, raise, cultivate, and, in general, to deal in all kinds of flowers, plants, shrubbery, floral pieces, both natural and artificial; to acquire, establish, manage and con- of the preferred stock, the Company may out of the surplus or net profits redeem such preferred stock, in such lots and at such times as the trol stores, green or hot-houses, horticultural gardens or establishments, stores, salesrooms, or other building or buildings deemed necessary for such business; and to engage in landscape and other gardening and to keep and maintain cemeteries and cemetery plots in condition.

(g) To establish, own, operate, and maintain

one or more school or schools, class or classes for the purposes of teaching, and to teach, the art or business of preparing and embalming the human dead for burial, and for preparing the human dead for cremation or incineration; in connection therewith to teach all things necessary or useful in the art or business of disposing of the human dead, and to issue certificates or diplomas of competency to such as acquire satisfactory knowledge and experience and proficiency in said art or business in any such schools or classes.

(h) To conduct its business and have one or more offices and unlimitedly and without restriction, to hold, purchase, lease, mortgage and convey real and personal property in or out of this State, and in such place or places in the several states or territories of the United States, colonial possessions or territorial acquisition of the United States and in foreign countries, as shall from time to time be found necessary and convenient for the purpose of the Company's business.

(i) To borrow money, to make and issue promissory notes, bills of exchange, bonds and evidences of indebtedness of the company of all kinds, for any of the objects or purposes of the company, secured by mortgage, or otherwise, without limit as to amount, and to secure the same in any lawful manner, as may be determined by the Board of Directors.

(j) To issue bonds, debentures or obligations of the Company, from time to time, or any of the objects or purposes of the Company, and to secure the same by mortgage or mortgages, or deed or deeds of trust, or pledge, or lien on any or all of the real and personal property, rights, privileges and franchises of the Company, wheresoever

situate, acquired and to be acquired, and to sell or otherwise dispose of any or all of the same, all in such manner and upon such terms as the Board of Directors may deem proper.

(k) Generally, to do any and everything necessary, convenient or proper for the accomplishment of any of the purposes or objects herein enumerated or the accomplishment of any purpose or object arising incidentally to the purposes herein mentioned, or which may at any time appear desirable or proper for the protection or best interest of the corporation, either as holders of or interested in any property or otherwise; with all the powers now or which may hereafter be conferred by the laws of the State of New Jersey upon corporations under the Act herein referred to.

(l) The foregoing clauses shall be interpreted and construed both as objects and powers, and it is the intention that the powers specified are not to be limited or restricted by the terms of any clause or paragraph herein contained, unless such restriction or limitation is expressed in terms, and it is hereby provided that the objects and powers herein specified are to be regarded as independent objects and powers, and are not to be held to limit or restrict in any manner the powers of the corporation.

FOURTH: The total authorized capital stock of this corporation is One Million ($1,000,000.) Dollars, divided into One Hundred Thousand (100,000) shares of a par value of Ten ($10.) Dollars each. Of such capital stock Thirty Thousand (30,000) shares shall be preferred stock, and the balance, Seventy Thousand (70,000) shares, shall be common stock.

The preferred stock may be issued as and when

the Board of Directors shall determine, and the holders of such preferred stock shall be entitled to receive, when and as declared from the surplus or net profits of the corporation, and the corporation shall be bound to pay thereon as and when declared by the Board of Directors, a dividend at the rate of seven (7%) per cent per annum, and no more, payable semi-annually on dates to be fixed by the by-laws, before any dividend shall be set apart or paid on the common stock of the corporation; the remainder of the surplus or net earnings may, in the discretion of the Board of Directors, be distributed as dividends among the holders of the common stock, payable as and when the Board of Directors shall determine.

In the event of any liquidation, or dissolution, or the winding up, whether voluntary or involuntary, or the distribution of assets of the corporation, the holders of the preferred stock shall be entitled to be paid in full the par amount of their preferred shares, before any amount shall be paid to the holders of common stock, and after the payment of the par amount of the common stock to the holders thereof, the remaining assets and funds shall be divided and paid ratably to all shareholders, without preference.

All classes of stock of this company shall have equal voting rights and privileges.

At any time after three years from the issuance Board of Directors shall determine, paying therefor a price not less than par.

FIFTH: The names and post-office addresses of the incorporators and the number of shares subscribed for by each, the aggregate of which (One Thousand ($1,000) Dollars) is the amount of capital stock with which this Company will commence business are as follows:

Name	Post-Office Address	No. of shares
William Necker	No. 255 Bergenline Ave. Town of Union, N. J.	Eighty (80)
T. McClelland	No. 318 Bergenline Ave. Town of Union, N. J.	Ten (10)
Chas. Singer, Jr.	No. 165 Bergenline Ave. Town of Union, N. J.	Ten (10)
	Total One Hundred	(100)

SIXTH: The period of existence of this corporation is unlimited.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the sixteenth day of March, Nineteen Hundred and Fourteen.

WILLIAM NECKER (L. S.)
THOMAS MCCLELLAND (L. S.)
CHAS. SINGER, JR. (L. S.)

Signed, sealed and delivered in the presence of Edward Hollander.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

Be it remembered, that on this Sixteenth day of March, Nineteen Hundred and Fourteen, before me, a Master in Chancery of New Jersey, personally appeared, William Necker, Thomas McClelland and Charles Singer, Jr., who I am satisfied are the persons named in and who executed the foregoing Certificate of Incorporation, and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

EDWARD HOLLANDER,
Master in Chancery of New Jersey.

Endorsed:

"Received in the Hudson Co., N. J. Clerk's office 16 Mar. A. D. 1914 and Recorded in Clerk's Record No..... on Page.....

John F. Crosby,
Clerk."

"Filed and Recorded,
Mar. 16, 1914,
David S. Crater,
Secretary of State."

"SCHEDULE D".

A regular meeting of the Board of Directors of Wm. Necker, Inc., was held at the main office of the Company, No. 255 Bergenline Ave., Town of Union, N. J., on Sept. 22nd, 1916, at 4 P. M.

Present were: Geo. Limouze, Chas. Singer, Jr., Thos. McClelland, Thos. Henry and E. J. Walschied.

Absent: Chas. Nielson.

Vice-Pres., Geo. Limouze reported the death of the President, Wm. Necker. He further reported that he was at the office of the Company daily and taking charge of its business. He further reported that a number of law suits were being prosecuted against the Company both in New York and New Jersey and that more likely to follow owing to the insufficiency of funds to meet the claims against the company. Mr. Limouze introduced the following resolution:

WHEREAS, the business of this Corporation has heretofore been under the personal supervision of the late William Necker, its President, who outlined and directed its business policies; and

WHEREAS, the death of William Necker has made it necessary to reorganize the affairs of the corporation; and

WHEREAS, various creditors and stockholders of the corporation have instituted suit and many others have threatened to do likewise, all of which will result in the waste and dissipation of the assets of this corporation pending its reorganization; and

WHEREAS certain other creditors and stockholders of the corporation have signified their intention of applying to the United States District Court of New Jersey for the appointment of a receiver to conserve the estate of William Necker, Inc. and to prevent waste;

NOW THEREFORE, Be it Resolved, that if such application be made by any creditors or stockholders of the corporation, that the corporation by answer duly filed do consent to the appointment of such receiver.

And be it Further Resolved that the officers of the Corporation be and they hereby are authorized under the seal of the corporation to execute for and on behalf of the corporation an answer in any such proceeding to the appointment of such a receiver.

On motion of Thos. Henry, the above resolution be adopted—Carried.

On motion of Thos. McClelland the usual assignment of bills payable to Wm. Necker, Inc. be made to the different banks and the Trustee, Geo. Limouze and Chas. Singer, Jr. in lieu of such accounts have been collected on accounts previously assigned to said banks and trustees pursuant to the agreement of May 3rd, 1915

CHAS. SINGER, JR.,
Sec'y.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

Frederick Michel, being duly sworn on his oath deposes and says: I am a co-partner with George

Rank in the printing business in the Town of Union, County of Hudson and State of New Jersey; said co-partnership is conducted under the trade name of Michel & Rank, William Necker, Inc., a corporation owes the said co-partnership $4,878.34, which is an unsecured claim for printing done for said corporation by said co-partnership prior to the first day of October, 1916. No part of said sum of $4,878.34 has been paid and the whole thereof is justly due and owing to said co-partnership from said corporation.

This deponent is informed that on or about October 1st, 1916, a bill of complaint was filed by one Frederick Kessler, and others, against said William Necker, Inc., in the United States District Court for the District of New Jersey, and that said Court upon said bill appointed a receiver, to wit; Thomas F. Martin. Deponent is informed that said Thomas F. Martin assumed the office of receiver under said appointment on or about the first day of October, 1916, and has ever since pretended and now pretends to be such receiver, and has ever since acted and now acts as receiver of said corporation.

Neither deponent nor his said co-partner, George Rank, has ever consented to such appointment or to the assumption of jurisdiction by the United States District Court in said cause.

FREDERICK MICHEL.

Sworn to and subscribed before me this 27th day of March, 1919.

John Maus,
Commissioner of Deeds for New Jersey.

STATE OF NEW JERSEY, County of Hudson. } ss.:

Charles Singer, Jr. of full age being duly sworn upon his oath deposes and says: I am secretary

of William Necker, Inc., and am familiar with all of the facts set forth in the foregoing bill of complaint. I have carefully read said bill of complaint and know that the facts set forth therein are true.

The defendant is a body corporate of the State of New Jersey organized for the purposes set out in the bill of complaint, and now engaged in the general undertaking, burial and funeral furnishing business. The copy of the charter of said corporation attached to said bill of complaint and marked "Schedule A" I have compared with the original articles of incorporation and the same is a true copy thereof.

There has been issued by said corporation and is now outstanding in the hands of upwards of 400 persons, 18,677 shares of preferred stock and 10,000 shares of common stock.

Said corporation after its formation on March 16, 1914, and until Sept. 30, 1916, carried on its authorized business through its duly elected officers and directors.

On September 30, 1916, the company's balance sheet was as follows:

ASSETS:

Lands & Bldgs.		$223,162.32
Equipment:		
Horse-drawn vehicles	$ 34,110.00	
Automobiles	50,052.80	
Horses	18,406.00	
Office & store fixtures	56,549.85	
Harness, etc.	5,381.00	164,499.65
Mortgages receivable		25,927.71
Accounts receivable	136,055.58	
Less reserve for doubtful accounts	37,570.26	98,485.32

Sundry accounts		9,553.48
Prepaid insurance		5,697.00
Cash on hand or in banks		727.69
Stock on hand, approximately		43,969.02
Loss		16,461.16
Total		$588,483.35

LIABILITIES:

Mortgage payable		$107,722.41
Bills payable, Banks		39,700.00
Bills payable, merchandise		59,821.02
Accounts payable		49,099.11
Over-drafts in banks and post dated checks		15,134.02
Employee's deposits		7,115.50
Sundry liabilities		1,969.71
Dividend payable, Wm. Necker a/c.		8,865.06
Reserve for depreciation & taxes		7,053.70
Interest & rents past due		4,477.20
Preferred stock	$187,525.62	
Common stock	100,000.00	287,525.62
Total		$588.483.35

Said corporation until Sept. 30, 1916, was at all times solvent, in my judgment. It had never suspended its ordinary business for want of funds to carry on the same, and its business had been conducted without loss or prejudice to the interest of its creditors and stockholders, and with entire safety to the public and advantage to the stockholders.

But owing to the death on September 12, 1916, of William Necker, the president and guiding spirit of said Company, certain stockholders and a creditor did on Sept. 30th, 1916, file a bill of complaint in the United States District Court for the District of New Jersey, against said corpor-

ation, as set forth in the annexed bill of complaint. I have compared the copy of said bill of complaint so filed in the Federal Court which copy is attached to the annexed bill of complaint and marked "Schedule B", with the original on file in the Clerk's office of said Federal Court, and the same is a true copy of said original.

I have also compared "Schedule C" attached to the annexed bill of complaint with the original answer on file in said Clerk's office, and "Schedule E" with the original decree therein filed, and "Schedule F", "Schedule G", "Schedule H", "Schedule I" and "Schedule J", respectively with the original receiver's reports therein filed, and all of said copies are true copies of the originals so filed.

I have also compared "Schedule D" with the original resolution in the minute book of the directors of said corporation, and the same is a true copy.

Said receiver has since Sept. 30, 1916, at all times, and now is, in possession of the assets of said corporation without interference by it, or by its officers, agents, employees or directors.

CHARLES SINCER, JR.

Sworn to and subscribed before me }
this 28th of day March, 1919. }

Harry J. Caffarata,
Att'y at Law of N. J.

SCHEDULE D.

Order Appointing Receiver and to Show Cause.

IN CHANCERY OF NEW JERSEY.

FREDERICK MICHEL and GEORGE RANK, Co-Partners, etc., *Complainants,* *vs.* WILLIAM NECKER, INC., *Defendant.*	On Bill, etc.

This matter being opened to the Court by Dougal Herr, Esquire, of counsel with the complainant, in the presence of Adolph J. H. Peters, Esq., of creditors, no one else appearing, and it appearing to the Court that the order to show cause heretofore made herein has been duly served as in said order directed, and the Court having considered the bill and arguments of counsel, and it appearing to the Court that the business of the defendant corporation has been and is being conducted at great loss and greatly prejudicial to the interests of its creditors and stockholders, so that its business cannot be conducted with safety to the public and advantage to the stockholders, and that the injunction provided for in "An Act Concerning Corporations", Revision of 1896, should issue and that a receiver should be appointed;

It is thereupon on this first day of April, 1919, ordered, adjudged and decreed that the business of the defendant corporation, William Necker, Inc., has been and is being conducted at great loss and greatly prejudicial to the interests of its creditors and stockholders, so that its business

cannot be conducted with safety to the public and advantage to the stockholders;

And it is further ordered that the said corporation and its officers and agents desist and refrain from exercising any of its privileges or franchises and from collecting and receiving any debts, or paying out, selling, assigning or transferring any estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the Court, until this Court shall otherwise order, and that upon the application of any party in interest, without notice, if it be deemed advisable, an injunction issue to such effect.

And it is further ordered that J. Raymond Tiffany, Esquire, of Hoboken, be and he is hereby appointed Receiver of said defendant corporation and of its assets, with all the powers and charged with all the duties conferred upon such a receiver under the said act entitled "An Act Concerning Corporations", Revision of 1896, and the supplements and amendments thereto; such receiver shall have full and complete power and authority to demand, sue for, collect, receive, and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description of the corporation, and to institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the said corporation, and in his discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property, or in any wise responsible at law or in equity to the corporation, upon such terms and in such manner as he shall deem just and beneficial to the corporation, and in case of mutual dealings between the corporation and any person to allow

just set-offs in favor of such person in all cases in which the same ought to be allowed, according to law and equity; and he shall have full and complete power to sell, convey and assign all of the said estate, rights and interest, and shall hold and dispose of the proceeds thereof under the directions of this Court, as well as all other powers conferred upon him by the act aforesaid.

And it is further ordered that before entering upon the discharge of his duties, the said Receiver take and subscribe the oath prescribed by law and enter into a bond to the Chancellor for the faithful performance of his duties and his obedience to such orders, as the Court may make in the premises, in the sum of One Thousand Dollars ($1,000.-00), which bond may be approved by any Special Master of this Court and shall be filed in the office of the Clerk.

And it is further ordered that the said defendant corporation, its directors and officers, do upon demand of the Receiver, forthwith convey to the Receiver all of the property and assets of the corporation and title thereto.

Leave is reserved to any party in interest or to the Receiver to apply to this Court for any modification or enlargement of this order as they may be advised to be proper.

And it is further ordered that the creditors and stockholders of the said corporation show cause before this Court on Tuesday, the 22nd day of April, 1919, at Chancery Chambers, Prudential Building, Newark, New Jersey, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the said J. Raymond Tiffany, Esq., should not be continued as Receiver, and why some other person or persons should not be substituted in his place, and why some other person or persons should not be associated with him as co-receivers.

And it is further ordered that copies of this order, which need not be certified, be mailed within ten days from the date hereof to all of the creditors and stockholders whose addresses can be ascertained by the Receiver.

E. R. WALKER,
C.

Respectfully advised,
MERRITT LANE,
V. C.

SCHEDULE E.

Order Continuing Receiver, &c.

IN CHANCERY OF NEW JERSEY.

FREDERICK MICHEL, *et al.*, *Complainants,* *vs.* WILLIAM NECKER, INC., *Defendant.*	On Bill, etc.

This matter coming on to be heard upon the return of the order to show cause made herein on April 1, 1919, requiring the creditors and stockholders of said defendant corporation to show cause why J. Raymond Tiffany, Esquire, should not be continued as Receiver and why some other person or persons should not be substituted in his place, and why some other person or persons should not be associated with him as co-receivers; and upon the return of the order made herein on April 5, 1919, requiring the creditors and stockholders of said defendant corporation and all others interested to show cause why said J. Ray-

mond Tiffany, Esquire, should not be continued as Receiver or someone appointed in his place and stead, and why the instructions therein given said receiver should not be confirmed and continued and why such other instructions should not be given as may be proper;

And it appearing that copies of both of said orders were duly mailed within ten days from the respective dates thereof to all of the creditors and stockholders of said defendant corporation whose addresses were known to or could be ascertained by the receiver, and that a copy of the order of April 5, 1919 was duly mailed to the federal receiver within ten days of the date thereof; all as in said order required;

It is thereupon, on this 22nd day of April, 1919, on motion of Dougal Herr, of counsel with the said J. Raymond Tiffany, receiver, no one else appearing, ORDERED that the said J. Raymond Tiffany be and he is hereby continued as Receiver of said defendant corporation and of its assets, with all the powers and charged with all the duties conferred upon such a receiver by and under an Act Concerning Corporations (Revision of 1896) and the supplements and amendments thereto, and with all the powers, authority and duties conferred upon him by the orders of this Court made in this cause on April 1, 1919, April 5, 1919, and April 8, 1919.

And it further appearing that the said Receiver has taken and subscribed the oath prescribed by law and entered into bond to the Chancellor for the faithful performance of his duties and his obedience to such orders as the Court may make in the premises, in pursuance of said orders, it is further ORDERED that no further bond be given by said Receiver until the further order of this Court, the said Receiver being hereby directed

upon coming into actual possession of the assets of said company to report that fact to this Court and thereupon enter into such further bond to the Chancellor as this Court may then require.

And it is further ORDERED that the instructions given to said Receiver by the said order of April 5, 1919, be and they are hereby confirmed and continued.

E. R. WALKER,
C.

Respectfully advised,
MERRITT LANE,
V. C.

Order Limiting Creditors.

IN CHANCERY OF NEW JERSEY.

Between
FREDERICK MICHEL and GEORGE RANK, Co-partners, etc.,
Complainants,
and
WILLIAM NECKER, INC., a corporation,
Defendant.
} On Bill, etc.,

On motion of the receiver heretofore appointed herein it is on this 8th day of April, 1919, ordered that the creditors of the said William Necker, Inc. do present to the receiver in this cause and prove before him under oath or affirmation, or otherwise as the said receiver shall direct, to the satisfaction of the said receiver, their several claims and demands against said corporation, within thirty days from the date of this order, or that they be exclud-

ed from the benefit of such dividends as may be hereafter made and declared by this court upon the proceeds of the effects of said corporation; and for the better ascertaining the creditors of the said corporation and what is due to them respectively, the said creditors are to be examined as the said receiver shall direct or may deem necessary and expedient and produce books and papers before him, on oath or affirmation (which oath or affirmation the said receiver is hereby authorized to administer) as well as to examine under oath and affirmation all such witnesses as shall be produced before him touching the demands of said creditors.

And it is further ordered that said receiver do cause proper advertisements to be published in the Hudson Dispatch a newspaper published in the Town of Union in this state, for the creditors of said corporation to come in before him and prove their claims and demands as in this order is provided; and that such publication be made within ten days from the date hereof, and be continued in said newspaper once a week for the space of three weeks.

And it is further ordered that within the same time said receiver also mail a notice of this order to the post-office address of each of the said creditors, if the same can be ascertained, with postage prepaid thereon.

E. R. WALKER,
C.

Respectfully advised,
MERRITT LANE,
V. C.

Petition of Receiver.

IN CHANCERY OF NEW JERSEY.

FREDERICK MICHEL and GEORGE RANK, co-partners, etc., *Complainants,* *vs.* WILLIAM NECKER, INC., *Defendant.*	On Bill, etc.

The petition of J. Raymond Tiffany, the receiver heretofore appointed herein, respectfully shows:

1. He was appointed receiver of the defendant corporation by this Court on the 1st day of April 1919.

2. On April 2nd, 1919, he subscribed and swore to the statutory affidavit prescribed by section 67 of "An Act Concerning Corporations (Rev. 1896)", and mailed the same to the Clerk of this Court for filing. He has prepared and had approved and has sent to the Clerk of this Court for filing a bond as required by said act and by the order of his appointment.

3. Since he was notified of his appointment on the evening of the 1st day of April, 1919, he has diligently sought a conference with Thomas F. Martin, the receiver appointed and acting under an order of the United States District Court for the District of New Jersey, in a cause wherein Frederick Kessler and others, are complainants and William Necker, Inc., is defendant, but has been unable to confer with said receiver, Martin, because said Martin has not kept his appointments with your petitioner.

4. Without some arrangements with the said Martin your petitioner is unable to enter the of-

fices of said corporation and has been unable to see the books or to inventory and appraise the property of said corporation, which your petitioner is very anxious to do promptly, and will continue to endeavor to do.

5. On April 3rd, 1919, the sheriff of Hudson County sold all of the Hudson County real estate of the defendant corporation to one John Callery for a sum sufficient to pay the foreclosure decree, costs, interest, etc., and to leave a nominal balance which will be surplus money and will be the property of the said defendant corporation or its receiver.

6. On the same day, April 3rd, your petitioner was informed that the said Martin had mailed to creditors and stockholders of said defendant corporation a copy of a petition and order dated March 31st, 1919, made by the United States District Court for the District of New Jersey, in the said cause there pending; and your petitioner did thereupon procure a copy of said petition and order, which is hereto attached and made a part hereof.

7. In and by paragraph 4 of said petition hereto attached the aggregate of the unassigned accounts and the accounts of said Martin, as receiver, is said to be $18,000.00. By the fifth report of said Martin a copy of which is attached to the bill of complaint herein it is stated in paragraph 16 that the amount of receivable accounts is $29,600.00, and in addition thereto $26,500.00 of old accounts upon the books. In paragraph 3, Schedule A of the same fifth report of said Martin it is stated that there are outstanding sundry accounts amounting to $2,431.40; outstanding accounts from October, 1916, to December, 1917, of $1,737.23 and outstanding accounts of 1918, amounting to $27,903.98.

8. In the fourth report of said Martin a copy of which is attached to the bill of complaint herein, by paragraph 2, Schedule A, it appears that the accounts receivable amount to $28,610.42 and the sundry accounts $1,715.58.

9. In the third report of said Martin, as receiver, a copy of which is attached to the bill of complaint herein, by paragraph 3, Schedule A, the accounts receivable appear to be $25,336.72 and the sudry accounts $1,715.58.

10. In the second report of said Martin, a copy of which is attached to the bill of complaint herein, the accounts receivable are given in paragraph 2, as $50,000.00, and the sundry accounts as $200.00.

11. All of said figures so given in the said reports of the said Martin are exclusive of certain outstanding accounts, which are called "Trustee Accounts", and which your petitioner understands to be the accounts assigned as set forth in the petition of the said Martin hereto attached.

12. Your petitioner being so far without access to the books of the said corporation is unable to understand from the said Martin's reports, which constitute the only source of information now available, how the aggregate of unassigned accounts together with the accounts due to the said Martin, as receiver, should be only $13,000.00 on this date.

13. Your petitioner further shows that by the third paragraph of the petition hereto annexed the said Martin expects on April 7th, 1919, to be directed by the order of the said United States District Court for the District of New Jersey to sell all of the assets of the said corporation except the outstanding accounts. Your petitioner is informed that the said assets include real estate

as well as personal property. By reference to the various reports of the said Martin, herein above referred to, it will appear that such assets are of very large value or at least were of large value when said Martin assumed control as said receiver.

14. It will appear that the said Martin had an offer of $142,000.00 for all of the assets of said corporation. Your petitioner is informed and believes that the bid of said Callery at the sheriff's sale aforesaid was about $112,000.00, which as the said Martin points out by the fifteenth paragraph of his fifth report leaves a balance of approximately $30,000.00. In other words, your petitioner is informed and believes that the said Martin intends to sell all of the assets of said corporation now remaining in his hands to the said Callery for $30,000.00 except for the outstanding accounts; that as to the said outstanding accounts, he expects to sell them to the said Callery for $8,000.00.

15. Your petitioner is informed and believes that the said assets are worth more than the sums above mentioned and should bring more than said sums at any public and open sale, but your petitioner is unable to justify his belief at this time by a thorough examination and inventory, for the reasons aforesaid, and can only point to the figures of the said Martin in his several reports.

16. Your petitioner charges that the said Thomas F. Martin has no title to any of said assets as receiver of the said United States District Court for the District of New Jersey, and that the said United States District Court of the District of New Jersey is without jurisdiction to order its said receiver to sell any of said assets and your petitioner urges that before any of the assets are sold opportunity should be afforded to your petitioner to make a thorough examination, inventory and appraisement of the tangible prop-

erty and an examination of the books of the corporation and of said Martin to determine the true value of the book accounts outstanding, and that before any sale shall be made conflicting claims of creditors as to priority of the assets ought to be determined and settled in order that all persons interested may be able to bid intelligently, whereby a larger sum may be realized for said assets.

Your petitioner therefore respectfully prays that he may be instructed by this court in the premises and may be ordered to intervene in the United States District Court for the District of New Jersey in the said proceeding there pending for the purpose of urging the above considerations and for such other relief in the premises as this court may deem necessary and proper.

Your petitioner will ever pray, etc..

DOUGAL HERR,
Of Counsel with Petitioner.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

J. Raymond Tiffany, being duly sworn on his oath deposes and says:

I am the petitioner named in the foregoing petition; I have read the same and the facts therein are true, except those alleged to be on information and belief, and as to those facts I believe them to be true.

J. RAYMOND TIFFANY.

Sworn to and subscribed before me }
this 4th day of April, 1919. }
Leon Abbett,
Master in Chancery
of New Jersey.

Conclusions of the Vice-Chancellor.

IN CHANCERY OF NEW JERSEY.

Between

FREDERICK MICHEL, *et als.*, *Complainants*,

and

WILLIAM NECKER, INC., *Defendant.*

On Bill. On Petition of receiver.

Reported in 106 Atl. Rep. 449.

HEADNOTE.

1. In a case in which it appeared that in October, 1916, the Federal District Court of this District had taken over the administration of the affairs of a corporation (engaged in the business of undertaking) in a general administration suit instituted by a non-resident creditor and stockholder, with the consent of the corporation, and that the business had been conducted from the time of the appointment of the receiver down to the present time, and that none of the assets of the corporation had been liquidated except such as were liquidated incidentally in the running of the business, upon the application of a creditor upon a bill filed under the statute in the Court of Chancery it was held:

(a) That the proceedings in the Federal Court did not preclude proceedings under the statute in the Court of Chancery.

(b) That the Court of Chancery would take jurisdiction, the statutory requisites being present.

(c) That notwithstanding the fact that the assets were within the control of the Federal receivers, a receiver would be appointed, the statute and public policy requiring that the corporation having been enjoined from exercising its privileges and franchises, there should

be in existence a statutory agent known as a receiver and the creditors and stockholders being entitled to the appointment of a receiver to represent their interests as well as the interests of the corporation.

(d) That the receiver would be instructed to apply to the Federal Court to set up the proceedings in the Court of Chancery, urge that the proceedings in that court supercede the proceedings in the District Court and ask the District Court to direct the delivery to him of the assets for administration in the Court of Chancery; to ask the District Court to, in any event, turn over to him the funds derived through the administration in the Federal Court before any distribution to creditors, to the end that the funds may be dealt with in accordance with the statute; to appear, if he is so advised, in the Federal Court, to urge upon that court such considerations as he may be advised is proper and in the interest of his *cestui que trustent*, and authorized to perform such acts, including, if he is so advised, consents in the Federal Court as he may consider in the interests of his trust, provided that he is not to so subject himself to the jurisdiction of the Federal Court as that that court may have power to direct him in the performance of his duties as receiver, or to enjoin him from the performance of his duties, or any act directed by the Court of Chancery, or to direct him to perform any act which may be forbidden by the Court of Chancery.

2. The nature of proceedings under the statute concerning insolvency, etc., considered and likened to probate proceedings.

3. The Court of Chancery will, and will direct its receiver, to co-operate with the Federal Court so that there may be no loss to creditors or stockholders.

* * * * * * * * * * *

Mr. Dougal Herr for receiver.

* * * * * * * * * * *

LANE, V. C.

This is an application by a receiver, appointed under the statute, of defendant corporation for instructions as to his course of procedure. In October, 1916, the United States District Court for

this district, on a bill filed by a creditor and stockholders against the defendant corporation, alleging that its affairs were in such condition as that unless their administration were taken over by the court there would be loss to creditors, appointed a receiver, who has been continuing the business (that of an undertaker) until the present time. On April 1, 1919, upon a bill filed by a creditor setting forth the statutory requisites, this court appointed a receiver under the statute. There are in the possession, or under the control, of the Federal receiver, considerable personal assets and it is represented that this receiver is about to apply to the Federal Court for permission to dispose of some or all of them. Up to the present time, as represented to me, none of the assets of defendant have been liquidated through the Federal receivership except such as were incidentally liquidated in the running of the business. The receiver appointed by this court represents that he has not yet had sufficient opportunity to fully familiarize himself with the affairs of the corporation (he qualified April 2nd) but that, from such investigation as he has been able to make, he believes that it is his duty to intervene in the federal proceedings and urge upon the Federal Court, in the right of general creditors and stockholders, that the assets should not be disposed of until, at least, he has had sufficient time to thoroughly go into the situation. He also insists that the statutory procedure put in motion by this court supersedes the proceedings pending in the Federal Court, and that there is nothing left for that court to do but to compensate its receiver and turn over the administration of the estate to this court, and (orally) that in any event as representing creditors, he alone is entitled to any proceeds which may be realized through the federal administration, and that creditors must now seek their rights and their

payments through him. There is an application to be made in the Federal Court on Monday, April 7th so that the receiver must have his instructions at once. There is no time for notice to creditors and stockholders. An order to show cause will go, however, requiring all creditors and stockholders to show cause why the instructions now given to the receiver should not be continued or other instructions given.

On awarding the statutory injunction and appointing the receiver I held that where it appeared that the administration of the affairs of a corporation of this State is, and has been for a considerable space of time in the hands of a receiver appointed by a federal court in an ordinary equity administration suit instituted by creditors and stockholders with the consent of the corporation, and a creditor or stockholder applies to this court to set in motion the statutory machinery for winding up, it is the duty of this court to act and act at once. I followed my own decision in *Hitchcock vs. American Pipe and Construction Company,* 105 Atl. 655 and Vice-Chancellor Stevenson in *Elm vs. International Steam Pump Co.,* therein referred to. In urging against the appointment of a receiver counsel represented that my criticism of the practice of the federal courts in making orders affecting the rights of creditors and stockholders without notice to them did not apply to this district and that this was a distinguishing feature. Counsel overlooked the fundamental ground upon which the court acts. The legislature of this state has provided by statute that whenever a corporation, incorporated under the laws of this state, gets into a condition such as the defendant corporation here is in, it should be wound up in a certain manner and by a certain procedure; that directors and officers should be under certain dis-

abilities; that stockholders should be under certain obligations; that the assets should be dealt with and distributed in a certain manner and that creditors and stockholders should have certain rights among which is to have in existence a statutory officer known as a receiver, who, by virtue of the statute, represents not only the court, but the corporation, its stockholders and its creditors, and who has and may exercise the rights of all. This receiver has certain statutory rights and duties. He is, to a great extent, an independent ego, a new creature. There is nothing akin to him known to the federal practice, except in the administration of the statute. It almost seems a waste of time to more fully describe our procedure. Vice-Chancellor Stevenson in a series of cases among which is *Gallagher vs. Asphalt Co.*, 67 N. J. E. 441 covered the situation and I considered it in the *Hitchcock* case. The statutory procedure is in the nature of an equitable *quo warranto*. It is in the nature of a probate proceeding. It is a winding up of the affairs of a deceased corporation through a statutory agent, just as a probate proceeding is a winding up of the affairs of a deceased individual through an agent authorized by statute. A decree of dissolution actually killing the corporation may be entered at any time after the appointment of a receiver. The corporation indeed may be considered dead after the award of the statutory injunction although it may be revived by proceedings under the 69th section. As a result of the proceedings the corporation and its liabilities are extinguished. As I pointed out in the *Hitchcock* case this is not at all the result of the proceedings in the federal court. Its receiver is a mere custodian with such powers over the assets as may be vested in him by order. He represents no one but the court. The corporation is still assumed to repre-

sent creditors and stockholders. No decree of dissolution can be entered. The liabilities of the corporation are not extinguished except *pro tanto*. The statute of this state is a part of the charter of every corporation organized under it and every stockholder and creditor becomes such charged with notice of its provisions and subjects his rights to the effect of its operation, and this irrespective of whether he be resident or non-resident. If, prior to the award of the injunction and appointment of the receiver in this suit, there had been pending in this court a general equity administration suit, such as is now pending in the District Court, there is no doubt but that this suit would supercede that. There have been several cases in which this situation was presented which have come under my observation. *Morse vs. Metropolitan Steamship Co.*, 100 Atl. 219 was one. There a general equity administration suit was instituted and a general equity receiver appointed, subsequently a statutory receiver was appointed and there was no question but that the statutory proceedings superseded the general equity suit. So it would seem to me to be a logical conclusion that, the statutory method of having been put in motion by this court, it should take precedence of the general equity administration suit instituted in the federal court. It is hard to conceive that the mere fact that the general equity suit is pending in a federal court can make any difference. The complainants in that suit went in to the federal courts to enforce their rights because they were non-residents, but I do not understand that they can enforce any alleged rights which they do not have under the state law. Non-residents they may be but their rights are measured by the law of the state. If a suit were pending in the federal court against an individual and that individual died before

judgment there is no doubt but that the adverse suitor would be bound by the state law with respect to the administration of the estate of deceased and so it would seem that, a court of competent jurisdiction having taken over the administration of the affairs of this defendant corporation under the statute in a proceeding akin to probate proceedings, having in effect killed the defendant, deprived it of the power to exercise any of its rights, of its power to appear in the federal proceedings, the proceedings in the federal court, it may well be urged are superseded, and that court holds custody of the assets (to which the receiver appointed under the statute as representing the corporation, its stockholders and creditors, is entitled) only for the purpose of securing compensation to its receiver and officers, just as in case bankruptcy proceedings are instituted after the appointment of a statutory receiver by this court, it has been held, this court holds custody of the assets (to which the trustee is entitled) only for the purpose of securing compensation to the receiver and the payment of administration expenses. The moment the statutory receiver is appointed he represents, as I have above stated, creditors and stockholders and *all* creditors and stockholders resident or non-resident including the complainants in the suit pending in the federal court. In his capacity as representing the corporation he is entitled to assert the rights of the defendant in that suit, in his capacity representing creditors and stockholders he is entitled to assert any rights of the complainants. If a decree of dissolution should go it would seem that, unless the receiver appeared in the federal court, the suit would abate. The reasoning which has induced the federal courts to hold that dissolution does not bar bankruptcy does not apply here. The nature of

the proceedings under the statute and the position of the receiver is well illustrated by the fact that the complainant in a suit under the statute has no control over the litigation. It may subsequently turn out there he is neither a creditor nor a stockholder, his claims may be wholly disallowed, yet the proceedings do not fall; the court proceeds, notwithstanding, to administer the statute.

I was of counsel in the case of *Elm vs. International Steam Pump Co.* and I refer counsel to my argument before Stevenson, V. C. in that case and to the cases which I cited in support of my conclusion.

It was urged against the appointment of a receiver in this case that such appointment would or might embarrass the administration of the assets in the federal court and result in loss to creditors, that after all creditors are interested only in getting as much out of assets as possible and not at all interested in [illegible] court the proceedings are taken. In appointing the receiver I said: "This court will not appoint a receiver for the sole purpose of endeavoring to take out of the jurisdiction of another court the administration of assets within its control. But so long as the statute remains in effect, as long as the public policy of this state is that the administration of assets of a corporation which is in the situation that this one is in, should be in a statutory manner and so long as it is the public policy that a statutory officer appointed by the court should represent all interests, then it seems to me that this court should not withhold its hand either with respect to the adjudication or the appointment of a receiver. It seems to me that the creditors and stockholders and the public generally are entitled under the statute, to have an officer appointed who will be charged with the duties imposed upon him

by statute and who will, in all senses, represent creditors and stockholders, and who may, in their right and in the right of the corporation, as he may be advised or directed, appear in the proceedings in the federal court." And see *Hitchcock vs. American Pipe & Construction Co.* Vice Chancellor Stevenson in the *Gallagher* case refused to appoint a receiver, although awarding a statutory injunction because, under the facts in that case, he held that such an appointment might tend to interfere with the proper administration of assets within the control and jurisdiction of the federal court. In the *Elm* case he appointed a receiver but refused to permit him to question the jurisdiction of the federal court in New York. The considerations which are now pressed upon me were not pressed upon him. The object in that suit was to question the jurisdiction of the federal court from the beginning. Here, assuming that the federal court had jurisdiction, it is argued that, the statutory procedure having been put in motion, it supersedes the proceedings in the federal court, just as if, had the statutory procedure been instituted in the federal court it would have superseded the general equity proceedings there pending, and it is further argued that creditors and stockholders must seek their rights and get their payments through the statutory receiver, that if the federal receiver be permitted to liquidate the assets, the fund must be turned over to the statutory receiver to be by him distributed according to the statutory scheme; that if it be a fact, which is denied, that general creditors secured any rights through the institution of proceedings in the federal court, those rights must be asserted in these proceedings, just as if the general equity proceeding had been instituted in this court. The question is whether this court ought, because of a fear that there may be

some loss to creditors, in defiance of the public policy of this state, forbid its receiver taking the position toward the federal administration which he urges here. I have concluded that this court ought not to so act, at least at this time. The statute and public policy, as I understand the situation, requires the administration of the affairs of the corporation in the statutory manner and by the statutory procedure; the creditors appearing in this suit are entitled to their rights as well as the creditors appearing in the federal court; all creditors and stockholders are entitled to the full benefit of the statute which can only be obtained through this procedure. I do not apprehend that there is any real danger of loss. The receiver at this time will not be directed to do anything more than call for the judgment of the District Court upon the questions raised. If he did less I think he would be derelict in his duty. It must not be overlooked that the statute imposes his duties upon him not the order of this court. This court is disposed to co-operate, if necessary, with the federal court, in getting as much for the assets of the corporation and in winding up its affairs as speedily as possible. The questions raised may be speedily submitted to the federal court, and the matter is then, for the time being at least, with that court. The receiver will be directed to appear in the District Court, set up the proceedings in this court, urge that the proceedings here supersede the proceedings there and ask that court to direct the delivery to him of the assets for administration here, after however the federal receiver shall have been compensated and the administration expenses paid or provided for; to ask the District Court to, in any event, turn over to him the funds derived through the administration in the federal court, before any distribution to creditors, to the end that the funds may be dealt

with in accordance with the statute, to appear, if he be so advised, in the federal court representing the corporation and its creditors and stockholders, to urge upon the federal court such considerations as he may be advised is proper and in the interest of his *cestuis que trustent* and he is authorized to perform such acts, including if he be so advised, consents in the federal court, as he may consider in the interest of his trust. Creditors and stockholders will be required to show cause on April 22nd why these instructions should not be continued, or other instructions given and at the same time why the present receiver should not be continued or another appointed in his place and stead.

The receiver will not be permitted to so subject himself to the jurisdiction of the federal court that that court may have power to direct him in the performance of his duties as receiver, or to enjoin him from the performance of his duties or any act directed by this court, or to direct him to perform any act which may be forbidden by this court.

The federal receiver upon the return of the order to show cause heretofore referred to will be heard, if he so desires, without his submitting himself in any wise to the jurisdiction.

Since writing the above, it has occurred to my mind that in the *Gallagher* case, 67 N. J. E. 441, in which the Vice Chancellor declined to appoint a receiver for the purpose of interfering with the administration in the federal court it appeared that the federal court was proceeding under our statute, and in *Elm vs. International Steam Pump Company* in which the Vice Chancellor appointed a receiver but declined to instruct him to question the jurisdiction of the federal court in New York it appeared that the New York cause was a con-

solidated cause. A foreclosure proceeding had been instituted, of which proceeding the federal court had jurisdiction (aside from charges of collusion, etc). The foreclosure case had been consolidated with the administration suit and the same receivers had been appointed in the foreclosure case as in the administration case so that, irrespective of whether the court had jurisdiction in the administration suit, its receivers were entitled to the property in the foreclosure suit. I might say in passing that the Vice Chancellor permitted certain stockholders, in the name of the receiver, to raise in the federal court the question of collusion. Upon the issue of fact the federal court found against the stockholders.

I have also examined the cases of *People vs. New York City Railway Co.*, 107 N. Y. Supp. 247; *People vs. Hasbrouck*, 107 N. Y. Supp. 257 in which cases the Supreme Court of New York appointed receivers, in proceedings instituted under the statute of corporations, the administration of whose affairs had been taken over by the federal court in equity administration suits. I notice that the instructions given to the receivers in those cases are similar to the instructions which I have given to the receiver in this case. Justice Seabury cites many cases in support of the position that he took, and also reached the conclusion, upon authorities cited by him that the federal court would release its control. My impression is that no subsequent proceedings were taken by the receivers appointed by the state court in the federal court, at least I have no knowledge of any authoritative decision of the federal court. My impression also is that in the Metropolitan Railway litigation there was the foreclosure of a mortgage and the case would be similar to that of the International Steam Pump Company, that is, the federal receivers would have the right to control the assets in the foreclosure proceedings.

Order of the Chancellor.

IN CHANCERY OF NEW JERSEY.

Between FREDERICK MICHEL, *et als.*, *Complainants,* *and* WILLIAM NECKER, INC., *Defendant.*	On Bill.

This matter being opened to the court by Dougal Herr, of counsel with the Receiver, and upon reading and filing the petition and considering the oral representations of counsel:

It is on this fifth day of April, 1919, ordered that the Receiver appointed herein be and he is directed to appear in the District Court, set up the proceedings in this court, urge that the proceedings in this court supersede the proceedings there and ask that court to direct the delivery to him of the assets for administration here, after however the federal receiver shall have been compensated and administration expenses paid or provided for; to ask the District Court to, in any event, turn over to him the funds derived through the administration in the federal court, before any distribution to creditors, to the end that the funds may be dealt with in accordance with the statute; to appear if he be so advised in the federal court representing the corporation and its creditors and stockholders, to urge upon the federal court such considerations as he may be advised is proper and in the interest of his *cestuis que trustent* and he is authorized to perform such acts, including, if

he is so advised, consents in the federal court, as he may consider in the interest of his trust. He shall not have power however to subject himself to the jurisdiction of the federal court to the extent that that court may have power to direct him in the performance of his duties as receiver, or to enjoin him from the performance of his duties or any act directed by this court, or to direct him to perform any act which may be forbidden by this court,

And it is further ordered that the creditors and stockholders of the defendant corporation and all others interested show cause before the Chancellor at Chancery Chambers Prudential Bldg., Newark, on Tuesday the 22nd day of April, 1919, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard why J. Raymond Tiffany should not be continued as Receiver or someone appointed in his place and stead, and why the instructions herein given the receiver should not be confirmed and continued and why such other instructions should not be given as may be proper.

Further ordered that copies of this order which need not be certified be mailed to such of the creditors and stockholders of the defendant corporation whose addresses are known to the Receiver, and to the federal receiver within 10 days of the date hereof, and said federal receiver will be heard, if he desires, without his submitting in anywise to the jurisdiction.

E. R. WALKER,
C.

Respectfully advised,
MERRITT LANE,
V. C.

SCHEDULE F.

Order of Judge Davis.

On Return of Rule to Show Cause and on Special Application of Chancery Receiver, &c.

UNITED STATES DISTRICT COURT.
DISTRICT OF NEW JERSEY.

FREDERICK KESSLER, *et al.*, *Complainants*, vs. WILLIAM NECKER, INC., *Defendant*.	In Equity.

This matter coming on to be heard, on the return of the rules to show cause why the receiver should not be directed to sell certain of the assets of the defendant corporation; and on special application of J. Raymond Tiffany, Esq., the receiver of the defendant corporation, appointed by the Court of Chancery of New Jersey:

And it being represented to the Court that on April 1, 1919, the Court of Chancery of New Jersey, upon a bill filed by a creditor of said defendant corporation, appointed a receiver for said corporation, under the statute; and that said

Court of Chancery has instructed its said receiver, by order made on April 5, 1919 to appear in this Court, set up the proceedings in said Court of Chancery, urge that the proceedings in that Court supersede the proceedings here, and ask this Court to direct the delivery to said Chancery receiver of the assets of the defendant corporation for administration in said Court of Chancery, after, however, the Receiver of this Court shall have been compensated and administration expenses in this Court paid or provided for; to ask this Court to, in any event, turn over to said Chancery receiver the funds derived through the administration in this Court, before any distribution to creditors, to the end that the funds may be dealt with in accordance with the statute, and for other relief without power, however, to subject himself to the jurisdiction of this Court to the extent of becoming subject to the direction of this Court in the performance of his duties as receiver, or to the injunction of this Court from the performance of his duties, or any act directed by said Court of Chancery, or to the direction of this Court to perform any act which may be forbidden by the said Court of Chancery.

And said Chancery Receiver now appearing and urging upon this Court the considerations above recited, in accordance with said order of the Court of Chancery, and representing to this Court that he has not had opportunity to present said matter formally to this Court, and asking that this application be considered to be a formal application and with the same force and effect as though such formal application had been made; and asking this Court to instruct its receiver to refrain from selling any of the assets of the defendant corporation, or at least to adjourn said matters until such formal application can be made and properly disposed of;

It is, thereupon, on this Seventh day of April, 1919, on motion of Dougal Herr, Esq., of counsel with J. Raymond Tiffany, Esq., the receiver appointed by said Court of Chancery, in the presence of Samuel Heyman, Esq., of counsel with the receiver of this Court.

Ordered that for the purpose of this application, said Chancery receiver be considered to have made formal application to this Court, for the purpose of urging the considerations above set forth, and that he make such formal application within three days from this date, by petition to be filed herein.

And it is Further Ordered that the application of the receiver of this Court to sell the accounts receivable to John Callery for $8,000 be and the same is hereby denied.

And it is Further Ordered that said Chancery receiver submit a brief within one week upon the questions so raised by him, and serve a copy thereof within the same time upon the federal receiver, and that the latter received within one week thereafter, submit a reply brief to this Court and serve a copy thereof on the Chancery receiver, and in the meantime the decision of the Court upon said questions is reserved.

And it is Further Ordered that in the meantime the application of the Chancery receiver to adjourn the sale by the federal receiver of the personal assets other than accounts receivable be and the same is hereby denied, and said federal receiver is hereby authorized and directed to consummate such sale, subject to the confirmation of this Court; application for such confirmation to be made on notice to said Chancery receiver, who may be heard on the question of confirmation.

J. Warren Davis,
Judge.

SCHEDULE G.

Petition of J. Raymond Tiffany, Receiver.

UNITED STATES DISTRICT COURT.
District of New Jersey.

Frederick Kessler, *et als.*, *Complainants*, *vs.* William Necker, Inc., *Defendant.*	In Equity.

The petition of J. Raymond Tiffany, receiver of William Necker, Inc., appointed by the Chancellor of New Jersey, and now appearing specially in this cause for the purpose of urging the considerations hereinafter set forth, respectfully shows:

1. On April 1, 1919, Frederick Michel and George Rank, co-partners, a creditor of William Necker, Inc., filed their bill of complaint in the Court of Chancery of New Jersey, praying for the appointment of a statutory receiver of said corporation. A true copy of said bill of complaint is attached hereto and marked "Schedule A."

2. Upon reading and filing said bill, and the affidavits and schedules thereto annexed and referred to therein, on the same day, your petitioner was duly appointed receiver by an order of said Court, a true copy of which is annexed hereto and marked "Schedule B". Your petitioner thereupon duly qualified as said receiver.

3. On April 5, 1919, your petitioner filed in said Court a petition asking for instructions as to what he should do, if anything, in connection

with the proposed sale by the receiver of this Court of personal assets of said company. Upon filing said petition, said Court of Chancery made an order, a true copy of which is hereto annexed and marked "Schedule C."

3½. And your petitioner charges:

A. That this Court never had jurisdiction of the above entitled cause, because:

1. The suit is not one brought by non-residents to assert their rights, as distinguished from the rights of all creditors and stockholders, resident and non-resident.

2. The suit was brought by non-residents representing a class of which class there are also residents, so that there are residents on both sides of the litigation.

3. Congress had no powers under the constitution of the United States to empower the federal courts to entertain jurisdiction of this cause, and the federal courts could not entertain jurisdiction, because there is no grant of such power to Congress or to the courts; and for the federal courts to entertain jurisdiction of this cause impairs the reserved rights of the States (to wit, the State of New Jersey) improperly subjects the determination of rights of residents to the federal tribunal, deprives residents of their property without due process of law, and of the equal protection of the law.

4. The exercise by the federal tribunal of the power and jurisdiction exercised in this cause results in an impairment of the obligations of a contract, to wit, the contract evidenced by the charter of the corporation and the law of its creation, and is an impairment of the contract rights of creditors and stockholders.

5. The federal tribunal cannot exercise any

such jurisdiction as it has attempted to exercise in this cause because there is no analogous State proceeding.

B. That the proceedings in the Court of Chancery, aforesaid, must be held to supersede the proceedings in this Court. To hold otherwise would be to:

1. Deprive creditors and stockholders of their property without due process of law, and of the equal protection of the law.

2. Impair the obligation of the contract evidenced by the charter of the corporation and the law under which it was incorporated, and to impair the contract rights of creditors and stockholders.

3. Impair the reserved right of the States (to wit, the State of New Jersey) to provide an exclusive method (other than bankruptcy) of winding up the affairs of corporations organized under their laws, when such corporations are in the condition in which the defendant corporation now is.

C. That a proper consideration of the acts of Congress conferring jurisdiction upon the federal courts requires a finding:

1. That this Court had no jurisdiction to entertain this cause in the first instance.

2. That in any event the proceedings in the Court of Chancery aforesaid, supersede the proceedings in this Court.

D. In as much as a suit in the Court of Chancery similar in nature to this cause now pending in this Court would be superseded by a suit under the Statute (such as the suit now pending in the Court of Chancery as aforesaid), this Court is bound to apply the same rule, and to hold that its jurisdiction, if any, has been so superseded.

E. The jurisdiction now exercised by this

Court in this cause is the exercise of probate jurisdiction not permitted either by the constitution or by the Statutes.

4. Your petitioner therefore now applies to this honorable Court, specially, pursuant to the terms and conditions of the said last mentioned order, and insists that this Court is without jurisdiction over the subject matter of this suit, that if it ever had jurisdiction it has been superseded by the proceedings instituted in the State court as aforesaid, and that it should instruct its receiver forthwith to turn over to your petitioner all of the assets in his hands of said defendant corporation, after the federal receiver shall have been compensated and administration expenses paid or provided for, and that this court should in any event cause its receiver to turn over all funds to the Chancery receiver before distribution to creditors.

And your petitioner will ever pray, etc.

DOUGAL HERR,
Of Counsel with Petitioner.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

J. Raymond Tiffany, of full age, being duly sworn, on his oath deposes and says:

I am the petitioner in the foregoing petition named. I have read the same and the facts set forth therein are true.

J. RAYMOND TIFFANY.

Sworn to and subscribed before me }
this 8th day of April, 1919. }
Harry Bennett,
Notary Public of New Jersey.

SCHEDULE H.

Opinion of Judge Davis.

(258 Fed. Rep. p. 654.)

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

FREDERICK KESSLER, *et al.*, *Complainants*, *vs.* WILLIAM NECKER, INC., *Defendant.*	In Equity.

On petition by chancery receiver to have federal receiver turn over to him for administration property of an insolvent corporation whose business had been conducted by the federal receiver for 2½ years.

SMITH, MABON & HERR, for Chancery Receiver.
HEYMAN & HEYMAN, for Federal Receiver.

DAVIS, District Judge:

On September 30, 1916, a bill was filed in this Court by Frederick Kessler, Frieda Kessler, Isaac Kraus, Theresa McCormack and John C. Hitchman against William Necker, Inc. John C. Hitchman is a creditor and the other complainants are stockholders of the defendant company, which owns and conducts the business of a large undertaking establishment. Sometime before the filing of said bill, William Necker, who was a large owner in the company and conducted and practically controlled the same, died. The company was in fact a one-man concern. The complainants, inter alia, allege:

"The death of William Necker, as your orators are informed and believe, has also seriously affected the immediate credit of the company and many of the creditors of the company have instituted suits; some in the State of New York by attachment proceedings, others in the State of New Jersey by summons and complaint. A large part of the current indebtedness consisting of bills payable at banks, bills payable for merchandise and the general accounts payable is now overdue or will shortly be growing due, and the creditors holding these claims are pressing for payment while the defendant is at the present time unable to pay these claims without withdrawing from its business the funds constantly needed to meet labor and other immediate current necessities, and it is certain that if judgments are recovered against the defendant upon the suits already instituted, other creditors holding overdue claims against the defendant will also vigorously prosecute their claims to judgment. The defendant is therefore threatened with judgments upon the suits already instituted and with further suits at the instance of other creditors and with numerous execution sales, all of which will necessarily result in the disruption and suspension of its business, the destruction of its goodwill and of its business organization, the dissipation and shrinkage of its assets to the great detriment of all the creditors and stockholders * * * and prayed that the claim and interest of your orators in the premises as well as that of all other creditors and stockholders may be ascertained and determined and the assets of said defendant corporation marshalled and the liens and priorities of all parties in interest therein, determined and adjudged * * * and that the assets of said corporation may be administered as a trust fund for the benefit of your orators and all others having an interest therein; and that it may be adjudged and determined that said business has been and is being conducted

at a loss and in a manner greatly prejudicial to the interest of its stockholders. * * *

"May it please your Honors the premises considered to grant unto your orators the writ of injunction issuing in due form of law to said William Necker, Inc., restraining it and its officers and agents from further exercising its franchises and from collecting or receiving any of its debts due to it or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver or receivers appointed by the court."

On the same day, September 30, 1916, the defendant company filed its answer, admitted the allegations of the bill of complaint, joined in the prayer, that this court, sitting in equity, might take possession of all the property and business of the defendant, through the appointment of a receiver, and preserve and protect the property from being sacrificed and empower and authorize such receiver to take possession of the business and property of the defendant, pay all indebtedness due or to become due by the defendant and otherwise discharge the ordinary duties imposed by the court upon receivers, and that the proceeds arising from the sale of said property of the defendant corporation be applied to its indebtedness, etc. Whereupon, this court appointed a temporary receiver, who, upon consent of the corporation, the creditors and stockholders, was made permanent on October 23, 1916.

The receiver continued the business of the corporation from that time until the present, with the consent of the company, the creditors and stockholders, except the complainants in chancery proceedings, who first made known their objection by filing said proceedings in chancery about April 1, 1919, 2½ years after the receiver was appointed

and more than a month after he had filed his fifth report wherein he reported that the business could not be continued without loss to the creditors and stockholders and filed his petition praying for permission to dispose of the property. Upon rule to show cause why the assets of the company should not be disposed of, and upon notice to all creditors and stockholders, this court, with the consent of the corporation, creditors and stockholders, directed the receiver to advertise the property for sale. This was done and on the day of the sale it was reported to the court that no bid could be secured. The receiver subsequently reported to the court that he had secured a bid upon the property which, in his judgment, was a good offer and the best that could be obtained; whereupon a rule to show cause why said offer should not be accepted was granted which was served upon all the creditors and stockholders. Upon the return day, it was intimated that there was a possibility of securing a better offer; whereupon one or two adjournments were had with the consent of all parties interested, in order to ascertain if a better offer could not be secured. Apparently no better and not even so good an offer could be secured by the receiver, or any creditor or stockholder and on or about April 1, 1919, just before the receiver was to accept the said offer, Fred Michel, a creditor, and others, filed their bill in the Court of Chancery of New Jersey, for the purpose of winding up the business and dissolving the corporation; whereupon that court appointed a statutory receiver, who by direction of said court, has applied to this court for instructions, suggesting that this court never had jurisdiction of this cause and if it ever had, it has been superceded by the proceedings in the court of chancery to which this court should now

relinquish proceedings begun and conducted herein and turn over the property of the company now in the possession of the receiver of this court, after the payment of his fees, to the receiver of the Court of Chancery.

A Federal District Court has original jurisdiction of all suits of a civil nature at common law or in equity where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 between citizens of different states. Judicial Code No. 24. When the necessary elements, such as diverse citizenship and the required amount exist, giving jurisdiction to a Federal Court, it may administer equitable rights created by valid state statutes, such as those created by Sec. 65 of the New Jersey Corporation Act of 1896. *National Surety Co. v. State Bank,* 120 Fed. 593; *United States Shipbuilding Co. v. Conklin,* 126 Fed. 132; *Land Title & Trust Co. v. Asphalt Co. of America,* 127 Fed. 1; *Scott v. Neely,* 140 U. S. 106; *Hollins v. Brierfield Coal & Iron Co.,* 150 U. S. 371; *Maguire v. Mortgage Co.* 203 Fed. 358.

The one inhibition against the enforcement in a Federal Court of new equitable rights, created by state statute, is that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution of the United States. When the necessary elements giving Federal Court jurisdiction are present, the following rules are deducible from the cases relative to the jurisdiction and power of Federal Courts to enforce rights created and to administer remedies provided for enforcement and administration in state courts; 1. Rights, created or provided by the statutes of the states to be pursued in the state courts, may be enforced and administered in the federal courts either at law or in equity or in admiralty as the nature of the new

rights may require; 2. An enlargement of equitable rights by the statutes of the states may be administered by the federal courts as well as by the courts of the states; 3. A party by going into a federal court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. *Darragh v. H. Wetter Manufacturing Co.* 78 Fed. 7, 14, and the cases there cited.

The complainants in this bill are stockholders and contract creditors, whose claims have not been reduced to judgment. May either class, stockholders or simple contract creditors, maintain the bill, it being admitted that there are the other necessary elements giving this court jurisdiction? Judge Bradford, in the case of *Jones, et al., v. Mutual Fidelity Co.*, 123 Fed. 506, in a very careful and well considered opinion, after reviewing the cases, held that a simple contract creditor whose claim had not been reduced to judgment might maintain a bill in a federal court and have the assets of an insolvent corporation administered where such administration is the enforcement of a purely equitable right by a purely equitable remedy and where the prior exhaustion of the legal remedy would practically nullify the equitable remedy. The objection that a simple contract creditor whose claim has not been reduced to judgment may not maintain a bill is based upon the Seventh Amendment of the Federal Constitution, which provides that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved."

In the case of *Scott v. Neely*, supra, Mr. Justice Field, speaking for the court, said:

> "In the Federal Courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal Courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be reserved intact."

That equitable relief can be granted in aid of a legal remedy, only after such remedy has been exhausted, precludes a conflict between legal and equitable remedies in the same suit. The substance of Judge Bradford's opinion, which had been followed in several cases, is contained in the following extract:

> "There is a clear distinction between the exercise of equitable jurisdiction in aid of a legal remedy for the collection of a pecuniary legal demand, and the exercise of equitable jurisdiction in enforcing a purely equitable right by a purely equitable remedy, created by a valid state statute, not in aid of any legal remedy, but wholly independently thereof, though the existence of such equitable right and remedy may presuppose and be dependent on the existence of such pecuniary legal demand * * *. If the procedure and relief are essentially equitable, the circumstance that they bear relation to a legal demand is immaterial. Where the procedure and relief provided by a state statute are essentially equitable, and such relief is impossible of attainment in any action at law, not owing to the existence of any accidental or abnormal obstacles or difficulties, but by reason of the essential nature of such action and legal process, a case for purely equitable cognizance under the statute is presented. Where equitable rights and remedies under a statute, founded on or bearing relation to pecuniary legal demands would be defeated

by exhausting the remedy at law on such demands, such equitable remedies cannot be considered as in aid of the legal remedy. Under such circumstances an exhaustion of the legal remedy would practically nullify the remedy in equity, and therefore, if force should be given to the statute, it would be not only unnecessary, but improper, before proceeding thereunder to exhaust the legal remedy."

Vice Chancellor Stevenson in the cases of *Gallagher, et al., v. Asphalt Co. of America*, 67 N. J. E. 441 and *Helms v. International Steam Pump Co.* (unreported) distinguished between the New Jersey Act and the Act of Delaware with which Judge Bradford was dealing. In the New Jersey Act, he says, the complainant, the creditor or stockholder, is the attorney-general *pro hac vice*; he gets nothing by his decree; he has to present and prove his claim before the receiver. The creditor in his conception is a kind of public benefactor, acting in behalf of the public in a semi-official capacity for its protection. But Judge Archbald, sitting in this district by special assignment, in the case of *Jacobs, et al., v. Mexican Sugar Co.*, 130 Fed. 589, speaking of this New Jersey act, said:

"The complainant in such a bill, whether as stockholder or creditor, comes into court to protect his pecuniary interest, which is imperiled by the insolvency of the corporation and its inability to further carry out with success its corporate purposes. He seeks the intervention of the court in its affairs in the manner provided by the statute, to save himself as far as possible from financial loss. No merely benevolent purpose to shield the general public from imposition by reason of its insolvent condition brings him there; nor does he move in behalf of the state, of which the corporation is a creature as would the attorney general. * * * The proceed-

ing is prosecuted by the complainant because of the direct personal interest which he has to subserve. If successful, there will, in the final outcome, when the corporate affairs are wound up, be a money decree establishing his right to a share in what is realized, if the assets go far enough, or in favor of others who are necessarily brought into court by the proceeding, if they do not."

In the New York Act, from which the New Jersey Act was copied, the Attorney General instituted proceedings, in behalf of the state, to protect the public generally but in the New Jersey Act, any creditor or stockholder may file a bill. The purpose of this change was doubtless to enable any creditor or stockholder to maintain the suit in order to protect his own personal interest without the handicap of having to act through the Attorney General, the purpose of whose action was general and not individual. In the act of Delaware the bill may be filed by any creditor or stockholder just as may be done under authority of the New Jersey Act. The object of the complainant under both acts is the same, the protection of the individual interest of the complainant.

The Circuit Court of Appeals of the Fourth Circuit in the case of *M'Craw v. Mott,* 179 Fed. 646, following Judge Bradford, held that a simple contract creditor may maintain a bill in the federal court under authority of Sec. 65 of the New Jersey Corporation Act. Judge Archbald, on the contrary, in the case of *Jacobs, et al., v. Mexican Sugar Co., supra,* held that Jacobs, as a simple contract creditor whose claim had not been reduced to judgment, could not maintain a bill in the federal court under the authority of Sec. 65 of the New Jersey Corporation Act of 1896, because it was in violation of the Seventh Amendment to the Federal Constitution, but held that, as a stockholder, he could maintain it. It is not neces-

sary, however, to sustain the bill on the ground that the complainants, or any of them, were simple contract creditors. All of them but two, one original and one intervening, were stockholders and as such may maintain the action. *Jacobs, et al., v. Mexican Sugar Co., supra; Scattergood, et al., v. American Pipe & Construction Co.,* 249 Fed. 23.

Again no objection was raised to the jurisdiction of this court by the corporation or any one else on any ground whatever, but, on the contrary, the corporation filed an answer wherein it admitted the allegations of the bill, joined in the prayer thereof in asking the court to take jurisdiction and appoint a receiver. The corporation was the proper party to raise any objection on any ground to the jurisdiction of this court. The corporation having waived the jurisdictional question, it may not now be raised by the receiver in chancery. *Citizens Bank & Trust Co., et al., v. Union Mining & Gold Co.,* 106 Fed. 97; *M'Graw v. Mott,* 179 Fed. 646. Defenses existing in equity suits may be waived, just as they may in law actions and when waived the cases stand as though the objections never existed. Given a suit in which there is jurisdiction of the parties in a matter within the general scope of courts of equity and a decree rendered will be binding though the defenses, if made, would have resulted in a dismissal of the case. *Reynes v. Dumont,* 130, U. S. 354; *Brown v. Lake,* 134 U. S. 530. The Circuit Court of Appeals of the Second Circuit held in the case of the *Pennsylvania Steel Co. v. New York City Ry. Co.,* 198 Fed. 721, 737, that unless the corporation objected a suit might be maintained on the equity side of a federal court without the necessity of a judgment on a legal demand. "And now," said Judge Noyes, speaking for the

court, "that which was formerly regarded as the essential thing, the judgment, is unnecessary unless the corporation objects." In the case of *Re Metropolitan Railway Receivership,* 208 U. S. 90 109, the Supreme Court held that the fact that a simple contract claim had not been reduced to judgment and execution issued thereon might be waived in a court of equity. Mr. Justice Packham, speaking for the court, said:

> "It is also objected that the Circuit Court had no jurisdiction because the complainants were not judgment creditors, but were simply creditors at large of the defendant railways. The objection was not taken before the Circuit Court by any of the parties to the suit, but was waived by the defendant consenting to the appointment of the receivers, and admitting all the facts averred in the bill. *Hollins v. Brierfield Coal & Iron Company,* 150 U. S. 371, 380. That the complainant has not exhausted his remedy at law, for example, not having obtained any judgment or issued any execution thereon, is a defense in an equity suit which may be waived, as is stated in the opinion in the above case, and when waived the case stands as though the objection never existed.
>
> "In the case in the Circuit Court the consent of the defendant to the appointment of receivers without setting up the defense that the complainants were not judgment creditors who had issued an execution which was returned unsatisfied, in whole or in part, amounted to a waiver of that defense. *Brown v. Lake Superior Iron Co.,* 134 U. S. 350; *Town of Mentz v. Cook,* 102 N. Y. 504, 508; *Horn v. Pere Marquette R. R. Co.,* 151 Fed. Rep. 626, 633."

This court has jurisdiction of the parties whose citizenship is diverse, the requisite amount is in controversy, and the subject matter is equitable in its nature, it is therefore too late for the com-

plainants in the court of chancery, who waived defenses and consented to the jurisdiction of this court for 2½ years or slept on their supposed rights, to raise the objection at this time that this court is without jurisdiction.

It was held by the Circuit Court of Appeals of this Circuit in the case of *Scattergood, et al., v. American Pipe & Construction Co., supra,* that a stockholder's bill in an ancillary jurisdiction will be maintained when the corporation, in a financially embarrassed condition, voluntarily appeared and filed answer admitting the allegations of the bill. That case lays down the law of this circuit and is binding upon this court. The allegations of the bill in that case are practically parallel with those of the bill in the present case. The reasoning followed and the conclusions reached by the court in that case force the conclusion that this court, in the state and district of the corporation, had jurisdiction under the facts of the present case and should retain control of the assets in its possession and administer them.

The question of conflicting or concurrent jurisdiction between state and federal courts should always be approached with the utmost care and consideration. It is so easy, when a court is sensitive about its jurisdiction or prerogatives, to enter into conflict to the serious injury of the creditors. The practical purpose of courts generally is to see that insolvent estates are administered economically so that the largest possible dividend may be paid to creditors and the interest of stockholders preserved. For the accomplishment of this purpose comity between state and federal courts should be extended to its largest limits. In the present case, the receiver has conducted the business of the corporation since September 30, 1916. It is conceded by every one, so far as I am aware, that his conduct of the busi-

ness has been excellent. There has not been even a hint that the business has not been conducted well. The company is hopelessly insolvent. In the opinion of the receiver, and every one so far as I know, the time has come when the business should be wound up and the property disposed of. The court directed the receiver to advertise the property for sale. This has been done and he now has admittedly the highest possible offer for it. No better offer, and not even so good, has been secured, though the sale was adjourned several times in order to enable creditors and others, including complainants in chancery, to secure a larger offer but without success. Since September 30, 1916, the complainants in chancery have consented to, or stood by and watched the conduct of this business by the receiver of this court, and now when it is about to be closed up, they come forward and, not denying that the business should be wound up and the property disposed of, say the job should be given to them or their receiver and the property in the possession of the federal receiver turned over to the chancery receiver. It is difficult for me to understand their motive, for everything that the receiver has done toward winding up the business must be done again by the chancery receiver, if the property of the corporation is turned over to him, all to no purpose, and at the expense of the creditors. Neither on legal principle nor economic policy can I conceive a good reason why this should be done and under the facts of this case, my duty to the creditors demands that I direct the receiver of this court to continue to wind up the business of the said company, in accordance with the order heretofore made.

J. WARREN DAVIS,
Judge.

Order of Judge Davis.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

FREDERICK N. KESSLER,
Plaintiff,

vs.

WILLIAM NECKER, INC.,
Defendant.

J. Raymond Tiffany, Receiver in Chancery of William Necker, Inc., having made application to this Court for an order directing Thomas F. Martin, the Receiver of the above named defendant, appointed by this Court, to turn over to the said J. Raymond Tiffany, Chancery Receiver, all of the assets of the above named defendant in the possession of the said Thomas F. Martin, Receiver herein,

And the said application having come on to be heard in the presence of Dougal Herr, of counsel with J. Raymond Tiffany, Receiver in Chancery, and Samuel Heyman, of counsel with Thomas F. Martin, Receiver herein, and due deliberation having been had, it is on this day of August, 1919,

ORDERED ADJUDGED and DECREED, that the said application of J. Raymond Tiffany, Receiver in Chancery, be and the same hereby is denied.

J. WARREN DAVIS,
Judge.

INDEX.

Cases Cited.

STATUTES REFERRED TO.

United States.

New Jersey.

Supreme Court of the United States.

No. 26, ORIGINAL, OCTOBER TERM, 1919. EX PARTE.

In the Matter *of* J. RAYMOND TIFFANY, as receiver appointed by the Court of Chancery of New Jersey of William Necker, Inc., a body corporate, for a writ of mandamus, or in the alternative a writ of prohibition, directed to the Honorable J. Warren Davis, District Judge of the United States, for the District of New Jersey, and against the District Court of the United States for the District of New Jersey, *Petitioner.*	On Petition for writ of mandamus or prohibition.

BRIEF FOR THE PETITIONER FOR THE WRIT.

Statement of the Case.

The petition is for a writ of mandamus directed to the United States District Court for the district of New Jersey commanding it to fix the fees of a receiver appointed by it, of the assets of William Necker, Inc., a body corporate, and the expenses of administration, and after fixing such fees and providing for their payment and the expenses of administration, to direct its receiver to deliver to

the petitioner, the receiver appointed by the Chancellor of the State of New Jersey, under its statute concerning corporations, all the assets in the hands of the Federal receiver, or, in the alternative, for a writ of prohibition prohibiting the District Court from taking any further proceedings in connection with the receivership pending in that court, save only to fix the fees of the Federal receiver and the administration expenses and to direct their payment, and to direct the delivery of the assets in the hands of the federal receiver and the payment of any funds in his hands, after the expenses of administration in the Federal Court shall have been paid, to the receiver appointed by the Chancellor, and for such other relief as may be proper.

On September 30th, 1916 a bill in equity was filed in the United States District Court for the District of New Jersey, by persons residing in the State of New York, creditors and stockholders of William Necker, Inc., a corporation existing under the laws of the State of New Jersey, against the corporation alleging that its affairs were in such condition that unless their administration should be taken over by the court there would be loss to creditors and stockholders. On the filing of the bill the District Court made an order appointing a receiver. The bill of complaint is printed on page 28 of the record. Paragraph 12 (p. 33) reads as follows:

> "12. And your orators are informed and verily believe that the financial difficulties of the defendant are only temporary in their nature and can and probably will be overcome if the defendant can for a limited period be relieved of pressure from its matured and maturing obligations and its assets protected against disruption and waste through forced

levies and sales, and its good will and its organization preserved by a limited continuance of the business under the direction of some competent court of equitable jurisdiction, that the directors of said defendant or some of them and the widow of the said William Necker are willing to extend credit to and procure credit for the defendant if they can be assured of the further continued existence of said business, but that they dare not do so if defendant is to be subjected to the pressure of an attack upon its assets by all the creditors of the company now holding matured or maturing obligations and claims against the same."

Paragraph 13 (p. 34) of the bill alleges that the assets of the defendant are a trust fund; that the officers and directors have become unable to further discharge the duties of their trust and that unless jurisdiction is taken by the court there will be immediately precipitated unnecessary strife and controversy among the creditors.

The answer of the defendant, which was filed simultaneously with the bill (page 41 of the record) admits the allegations and joins in the prayer of complainants.

The order appointing the receiver (page 44 of the record) recites merely the filing of the bill and answer, and then orders, adjudges and decrees that Thomas F. Martin be appointed temporary receiver. It authorizes him to take possession of the assets and run, manage and operate the business in such manner as will in his judgment produce most satisfactory results so that the operation of the defendant company shall until the further order of the court be continued in the same manner as then carried on, or in an economical manner and in the best interest of the creditors and stockholders. The order is precise in the powers granted to the receiver. It directs

an injunction against the defendant corporation, its officers, agents, employees and all other persons, restraining them from interfering in any way with the possession or management of any part of the property over which the receiver is appointed or interfering in any way to prevent the discharge of his duties, or his management and operation of the business and property of defendant, and from instituting or prosecuting any suit or action against the defendant corporation, or against the receiver, without leave of the court. On October 16th, 1916 (p. 48 of the record) an order was entered confirming and continuing Martin as receiver during the pendency of the suit, with all the rights, powers and duties laid down and imposed in and by the original order. No other decree or order concerning the powers of the receiver has been entered. Acting under the order the receiver has continued the business of the company down to about the present time. No order has been entered designed to bring in creditors. No adjudication has been made with respect to the status of the corporation, nor has any injunction been granted other than as above set forth.

On March 28th, 1919 a bill of complaint (p. 50 of the record) was filed in the Court of Chancery of the State of New Jersey by creditors of the corporation against the corporation praying for the statutory injunction and the appointment of a receiver on the ground that the corporation was insolvent and that its business had been and then was being conducted at great loss and greatly to the prejudice of the interests of its creditors and stockholders, and that its business could not be conducted with safety to the public and advantage to the stockholders. This proceeding was instituted under an act of the legislature of

the State of New Jersey entitled "An act concerning corporations" revision of 1896. The pertinent sections of the statute are quoted in full on pages 9, 10, 11, 12, 13, 14 and 15 of the record. The bill was filed under section 65 (page 9). That section provides in substance that upon its being brought to the attention of the Court of Chancery that a corporation is insolvent, or that its business is being conducted at great loss and greatly prejudicial to the interests of its creditors and stockholders, and the court being satisfied of the existence of either of these conditions, the Court may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises, and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the Court. Under section 66 (p. 10 of the record) the Court of Chancery is given power at the time of ordering the injunction or at any time thereafter to appoint a receiver.

Upon the filing of the bill in the Court of Chancery an order to show cause was allowed and upon its return on April 1st, 1919, an order and decree was made (p. 70) adjudging that the business of the defendant corporation, William Necker, Inc., had been and was being conducted at great loss and greatly prejudicial to the interests of its creditors and stockholders so that its business could not be conducted with safety to the public and advantage to the stockholders. The Court then awarded the statutory injunction and appointed J. Raymond Tiffany (the petitioner for this writ) receiver under the statute, (page 70 of the record). This decree is, under the decisions

of the State of New Jersey, the final decree in the cause.

Pierce vs. Old Dominion Smelting Co., 67 N. J. Eq. 399 at p. 409;
Karst vs. Black Diamond Range Co., 82 Eq. 231;
Bull vs. International Power Co., 84 N. J. Eq. 7 at p. 9 affirmed on opinion of the Chancellor, 85 N. J. Eq. 206;
In re Thompson, 85 N. J. Eq. 221 at p. 258.

This decree fixed the status of the corporation. All its property and franchises vested, by force of the statute (sec. 68, p. 11 of the record) in the receiver. The order contained a direction to all creditors and stockholders to show cause why the receiver designated in the order should not be continued or some other appointed in his place and stead. This referred merely to the personnel of the receiver. Upon the return of this order the receiver was continued (page 73). He qualified on April 4th, 1919 and has been since acting as receiver. The statutory method providing for the liquidation of the affairs of the corporation has been strictly pursued. An order was made limiting creditors on April 8, 1919 (page 75). Claims have been filed and the Court of Chancery is proceeding with the liquidation of the affairs of the corporation in compliance with the statutory provisions. On April 10th, 1919, under direction of the Court of Chancery (pp. 82, 94) the Chancery Receiver filed a petition in the United States District Court setting up the proceedings in the Court of Chancery and praying that the United States District Court fix the fees of its receiver, provide for the payment of the fees and the expenses of administration and direct the re-

maining assets to be turned over to the Chancery receiver, and praying that the District Court in any event direct its receiver to turn over all funds to the Chancery Receiver before distribution to creditors (page 99). The District Judge filed an opinion (page 103) and entered an order (p. 116) in August, 1919, denying the application, whereupon the present proceedings were instituted in this court.

ARGUMENT.

I.

Proceeding for mandamus or prohibition is a proper remedy.

A. The order of the District Court was not appealable under section 129 of the Judicial Code.

Section 129—5 Fed. Statutes Anno. 629—makes appealable cases where "an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused."

The application of the receiver in Chancery in the instant case was not to dissolve the injunction. It is true that in the return of the District Court the following statement is contained:

> "He, (that is the Chancery receiver) made application to the United States District Court that the injunction issued by the Federal Court enjoining the corporation, its officers and all other persons from interfering with the possession of the Federal receiver and the company's assets be dissolved."

An inspection, however, of the petition of the Chancery receiver attached to the application for mandamus (page 102) indicates that his application was that the District Court "should instruct

its receiver forthwith to turn over to your petitioner all of the assets in his hands of said defendant corporation, after the federal receiver shall have been compensated and administration expenses paid or provided for, and that this court should in any event cause its receiver to turn over all funds to the Chancery receiver before distribution to creditors."

And if application had been made to dissolve the injunctive order contained in the order appointing the receiver it would not have been appealable under section 129.

Such is the effect of the decision of this Court in *Highland Avenue and Belt Railroad Company vs. Columbian Equipment Company,* 168 U. S. 627, 42 L. Ed. 605.

An order refusing to vacate a receivership is not made appealable under section 129.

B. The action of the District Court is not appealable under section 128.

Section 128—5 Fed. Stat. Anno, 607—applies only to final judgments or decrees. The opinion of the United States District Court in denying petitioner's application to intervene and for the relief prayed for in his petition is not appealable.

The present application is similar to that made by the petitioners in the Metropolitan Street Railway Cases, 208 U. S. 90, 52 L. Ed. 403, which cases this Court determined on the merits.

If the award of the writ prayed for be a matter of discretion, we respectfully submit that the discretion should be exercised, because the matter involves a conflict between the federal and state courts which should altimately be settled in some form of proceeding in this Court. While the party applicant is a receiver, he in fact represents the Court of Chancery of New Jersey, which

in its turn represents the state in its sovereign capacity. In the Metropolitan Street Railway Company cases this Court had before it private interests only, while in the case *sub judice* the State of New Jersey is in effect before the Court, through the attempt by its Court of Chancery to sustain the policy of its laws. The receiver in Chancery is acting under the direct orders of the Court of Chancery and was directed to act not in order to protect private rights but to maintain the policy of the State (p. 82 of the record).

Moreover, before proceedings on appeal could be determined in the Circuit Court of Appeals, and in this Court, the assets would be distributed and the questions involved would become merely academic.

II.

The proceedings in the federal court do not purport to be under the statute, but under the general power of the court to administer the assets of a corporation as a trust fund.

Counsel in respondent's brief devotes considerable space in endeavoring to demonstrate that the Federal District Court had jurisdiction to administer the state statute.

For the purposes of this case that point may be conceded. The difficulty is that the Federal Court did not assume to act under the statute. No insolvency is charged in the bill. On the contrary (page 33) the complainants allege that the financial difficulties are temporary and will probably be overcome if the defendant can, for a limited period, be relieved of pressure. In paragraph 13 (page 34) the charge is made that the assets are a trust fund.

Considering the bill as a whole it is clear that the intent was to appeal to the Federal Court under its general equity powers. In the order appointing the receiver (page 44) there is no award of the statutory injunction, although such an injunction is necessary before a receiver may be appointed under the statute. (*Pierce v. Old Dominion Copper Co.*, 67 N. J. Eq. 399, at p. 414.) The receiver appointed is given specific powers by the order appointing him, but the statute is not referred to in the bill or in the order; nor is it referred to in the order continuing the receiver (page 48). The statutory procedure has not been followed by the Federal Court in any particular in the administration of the estate. No order limiting creditors has been taken in accordance with the provisions of section 75 of the statute (page 12 of the record), nor have any proceedings been taken under section 76 (page 12). More than three years have elapsed since the appointment of the federal receiver, and no act has been performed either by him or by the Federal Court indicating an administration under the statute.

The corporation's business affairs have been conducted in precisely the same manner as if it had remained in the control of its directors, with the receiver exercising the corporate powers, collecting and disbursing moneys, incurring and liquidating debts, accountable to no one save the Court appointing him, with the hands of creditors stayed: all contrary to the policy of the law of the State.

It has been held time over and again that the jurisdiction of the State Court to appoint a receiver under the statute depends upon the existence of the conditions required by the act and upon the award of the statutory injunction.

Pierce v. Old Dominion Copper Co., 67 N. J. Eq. 399 at p. 414;
Karst v. Black Diamond Range Co., 82 N. J. Eq. 231;
Bull v. International Power Co., 84 N. J. Eq. 7; aff'd 85 N. J. Eq. 206;
In re Thompson, 85 N. J. Eq. 221 at page 258.

Elm v. International Steam Pump Co., not reported, but quoted in *Hitchcock v. American Pipe & Construction Co.*, 105 Atl. Rep. 655 at page 660.

The Federal District Court made no order adjudicating the existence of the statutory requisites nor did it award the statutory injunction.

It is quite clear that the proceedings in the Federal Court were intended to be based upon the same theory as was the bill in *Scattergood et al. v. American Pipe and Construction Co.*, 249 Fed. 23 (in which case a writ of certiorari is now pending undetermined in this court, 247 U. S., 516).

III.

The proceedings in the State Court are in the nature of an equitable *quo warranto* and involve the exercise of the sovereign power of the State over its corporations and the rights of the public.

The learned judge of the District Court, resting his conclusion upon the opinion of Judge Archibald, who sat in the District of New Jersey by special assignment, in *Jacobs vs. Mexican Sugar Co.*, 130 Fed. 589, held in substance that the proceedings under the State statute did not involve

the rights of the public but were brought for the purpose of protecting complainant's individual interest and that any defenses which might be made against the complainant in such proceedings might be interposed against the receiver. In so holding, it is respectfully insisted he ignored every decision of the courts of New Jersey upon the subject.

In *Rawnsley vs. Trenton Mutual Life Insurance Company* (1852) 9 N. J. E. 95, the Chancellor (Williamson) speaking of the statute said:

> "Where a creditor or stockholder comes into court under this act, it is not his particular grievance the court is to redress or his individual interest that is to be protected, but the very object of the act is to protect the public at large from imposition, and to promote and secure the general interest of the stockholders and creditors."

In *Gallagher vs. Asphalt Company of America*, 67 N. J. E. 441, at p. 444 Vice Chancellor Stevenson said, referring to the statute under which your petitioner was appointed:

> "When we have either a creditor or a stockholder qualified to appear as the actor, to set in motion the machinery of the court for the accomplishment of justice, for securing this important remedy on behalf of the public for the prevention of fraud, certainly there is a very strong indication that what the statute is aimed to secure is the redress or the prevention of a public wrong rather than the enforcement of a private right—a private right either of a stockholder qua stockholder, or of a creditor qua creditor."
>
> "About forty or fifty years ago, Chancellor Williamson, in the leading case of *Rawnsley v. Trenton Life Insurance Co.*, 9 N. J. Eq. 95, said with that clearness which characterized almost everything that he ever did say, it is

not the particular grievance of the party complainant which is redressed in this proceeding: it is the public grievance. I am giving substantially his language; I have recently had occasion to quote it in an opinion. It is not, he says in substance, the private interest of the party complainant; it is the public interest which is cared for, including the general interest of the stockholders and creditors."

And further:

"I take it that in this case the substitution in New Jersey of the attorney general as the necessary actor in this case by any stockholder or any creditor was made simply because the legislative policy could be, would be inevitably carried out more fully in greater numbers of instances by leaving the power to institute the proceeding with a stockholder, or a creditor—any stockholder or any creditor * * *. That this is not a creditors' suit, but that it is such a quasi public proceeding, I think is well illustrated by the fact that the suit can be prosecuted to a final decree and the corporation can be placed under disabilities and then an order can be made dissolving the corporation precisely as has been done in this case, without administering any assets and without there being any assets capable of administration by this court * * *. In this connection it is worth while to note that, according to the well-settled doctrine of this court, while this suit is an action inter par[illegible] down to the time for the decree for an injunction, it then ceases to be an action *inter partes* the complainant no longer controls the cause, and the stockholders and creditors have to be brought in * * *. Very many of our chancellors have remarked—I think, certainly the idea is expressed in a number of reported cases—that in fact all of the stockholders and all of the creditors constitute a single party complainant in this proceeding. This statement is based on the idea that the actor who originates the proceeding is not acting in a

private capacity merely coming into court with his own private grievance as a creditor and seeking a means of collecting his debt. Nor is he acting on his own behalf and as the representative of creditors with a common grievance which such creditors, as a class, have against the defaulting debtor corporation. Nor is he acting, in case he is a stockholder, on behalf of the stockholders as a class for the redress of any injury to the rights of such stockholders. When a corporation is hopelessly insolvent, its stockholders are interested in a variety of ways in having its activities perpetually enjoined and its assets equitably administered. In the same case creditors have a very great interest, in some respects the same but in others widely different from that of the stockholders. The public at large, as has so often been pointed out, has a further distinct interest in preventing an insolvent corporation from contracting obligations and continuing its business operations in which it may deceive new parties and thereby perpetrate fraud. * * * That our statutory action against an insolvent corporation, the only essential object of which is to place the corporation under disabilities, is not in fact the personal action of the particular stockholder or creditor who is authorized to bring the action, and who may be induced to bring it from a variety of selfish motives, is illustrated by the nature of the final decree, which the actor, the creditor, we may say, obtains in his suit. He obtains no decree which necessarily benefits him personally. Nor does he obtain any decree which he owns or controls as a representative of or trustee for others. The decree, from the moment it is entered, is beyond his exclusive control and stands for the benefit of all the creditors and stockholders equally. This decree, while fixing the status of the complainant as a creditor for the purpose of qualifying him to sue, does not make it res adjudicata that he is entitled to $1. of the assets. He is obliged,

> after the final decree for an injunction has been obtained upon his motion and through his instrumentality, to prove his claim against the assets precisely as all the other creditors must prove their claims, and his entire claim may be rejected. He may thus utterly fail to secure the object which he had in view in bringing the suit, but the statutory object of the suit—its only legal object—is fully accomplished. There certainly seems to be grounds for arguing that the 'matter in dispute' in this suit in rem is the res, i. e., the status of the defendant corporation with respect to the exercise of its franchises, and that this 'matter in dispute' remains the same whether the complainant alleges himself to be a creditor and is inspired by the hope of a dividend, or alleges himself to be a stockholder whose sole object in prosecuting the suit is to stop the operations of the corporation and thereby ward off a liability or an increase of liability on a stock subscription, or whatever, among numerous other possible motives, may actuate the complaining stockholder or creditor in instituting the litigation."

In *Hoopes vs. Basic Company*, 69 N. J. E., 679 (affirmed 72 N. J. Eq. 426) at p. 685, Vice Chancellor Stevenson, again said:

> "We have here not a private action inter partes. The complainant, whether he is a stockholder or a creditor, acts as the representative of the public, and particularly of the whole body of stockholders and creditors of the corporation. It is a great mistake to suppose that this is a collection suit or a creditor's suit. The complainant, if he is a creditor, by his decree whether he is a creditor or stockholder—by his decree against the corporation resulting in its being wound up and its assets being distributed—gets nothing necessarily advantageous to himself. He is obliged, afterwards, to come humbly before

the receiver and prove his claim, and it may be rejected, and he may never have any share awarded to him in the assets, and that fact, as I have pointed out in this case, very strongly indicates that Chancellor Williamsom and Chancellor Vroom were entirely right in saying that this is an action in which not the particular grievance of the complainant is redressed, but the grievance of the public including the whole body of stockholders and creditors."

In *Pierce vs. Old Dominion &c. Smelting Co.*, 67 N. J. E., 399 the Vice Chancellor refers to the action as an equitable *quo warranto*. He says at page 405:

"How widely our statutory proceeding differs from a mere creditor's suit to collect money was indicated over fifty years ago by Chancellor Benjamin Williamsom, in one of the earliest cases which dealt with the nature of the remedy provided by our statute. *Rawnsley v. Trenton Mutual Life Insurance Co.*, 9 N. J. E. 95. The Chancellor says (at page 96): 'Where a creditor or stockholder comes into court under this act, it is not his particular grievance the court is to redress or his individual interest that is to be protected, but the very object of the act is to protect the public at large from imposition, and to promote and secure the general interest of the stockholders and creditors.' This statement clearly shows that beyond the collection of overdue debts our statutory action is aimed to secure those objects which are ordinarily attained by a *quo warranto* to action in a common law court. The reference in the statute to the 'safety of the public' points in the same direction."

He further said: "It has often been said that our statutory action is in the nature of a suit in *rem*. This description is correct, because the decree fixes the status of the corporation with respect to the exercise of its

franchises as against the whole world. *Albert vs. Clarendon Land &c. Co.*, 53 N. J. E., 625."

The case of *Hoopes vs. Basic Co.* heretofore adverted to, in which case Vice Chancellor Stevenson referred to his opinion in *Gallagher vs. Asphalt Co.* heretofore referred to, and also to his opinion in *Pierce vs. Old Dominion Smelting Co.*, was affirmed in the Court of Errors and Appeals by the unanimous vote of that court for the reasons stated in the opinion of Vice Chancellor Stevenson, 72 N. J. E., 426.

In *Michel vs. William Necker Inc.*, 106 Atl. p. 449, at p. 450, (printed in full in the record p. 82) Vice Chancellor Lane said, referring to the statutory procedure hereinbefore adverted to:

> "The statutory procedure is in the nature of an equitable *quo warranto*. It is in the nature of a probate proceeding. It is a winding up of the affairs of a deceased corporation through the statutory agent, just as a probate proceeding is a winding up of the affairs of a deceased individual through an agent authorized by statute. A decree of dissolution, actually killing the corporation, may be entered at any time after the appointment of a receiver. The corporation, indeed, may be considered dead after the award of the statutory injunction, although it may be revived by proceedings under the sixty-ninth section."

As hereinbefore stated, the order awarding the statutory injunction is the final decree in the cause, and before a receiver can be appointed the injunctive order must be made.

Vice-Chancellor Stevenson in *Elm v. International Steam Pump Company* (no opinion filed, but referred to and quoted by Vice-Chancellor Lane in *Hitchcock v. American Pipe and Construction*

Company, 105 Atl. Rep. 655, at p. 660) summed up the law on the subject in the statement:

> "The statutory decree is advised and thereupon the statutory receiver is appointed; and counsel will bear in mind that no statutory receiver can be appointed until after the disabling decree, the final decree, is passed."

And see case heretofore cited:

Pierce v. Old Dominion Copper Co., 67 N. J. Eq. 399 at p. 409;

Karst v. Black Diamond Range Co., 82 N. J. Eq. 231;

Bull v. International Power Co., 84 N. J. Eq. 7, at p. 9; aff'd 85 N. J. Eq. 206;

In re Thompson, 85 N. J. Eq. 221 at page 258.

IV.

The receiver appointed under the statute represents the corporation and all creditors and stockholders.

By force of section 68 of the statute (p. 11 of the record), upon the appointment of the receiver all the real and personal property of the corporation and all its franchises, rights, privileges and effects immediately vest in him. He exercises all the powers of the corporation. But he also exercises the rights of creditors and in their right may question transactions void only as against creditors. *Graham vs. Spielman,* 50 N. J. Eq. 120. He also represents judgment creditors. *Rapaport vs. Rapaport Express Co.,* 107 Atl. Rep. 822.

In *Turner and Seymour Mfg. Co. vs. Acme Mfg. Company,* not yet reported, Lane, Advisory Master, said:

"In the right of such judgment creditors the receiver may question the validity of the record of a conditional bill of sale."

The same Vice-Chancellor said in the instant case, (p. 85 of the record):

"The legislature of this state has provided by statute that whenever a corporation incorporated under the laws of this state, gets into a condition such as the defendant corporation here is in, it should be wound up in a certain manner and by a certain procedure; that directors and officers should be under certain disabilities; that stockholders should be under certain obligations; that the assets should be dealt with and distributed in a certain manner and that creditors and stockholders should have certain rights among which is to have in existence a statutory officer known as a receiver, who, by virtue of the statute, represents not only the court but the corporation, its stockholders and its creditors, and who has and may exercise the rights of all. This receiver has certain statutory rights and duties. He is, to a great extent, an independent ego, a new creature."

V.

Proceedings under the statute supersede all other proceedings against the corporation.

This follows from the nature of the proceedings under the statute as hereinbefore discussed. As the Chancellor said in *Kelly v. The Nesnanic Mining Co.*, 7 N. J. E. at p. 589:

"I am of the opinion that no judgment is entitled to preference unless it was obtained before the granting of the injunction under the provisions of the said act. The whole property is locked up by the injunction; and the receiver, by the terms of the act, is to

take possession of all the property belonging to the company at the time of the insolvency or suspension of business which induced the injunction."

The statute, in terms, provides for the method of adjudicating all claims against the corporation. Sections 75, 76, 78 and 86 (pp. 12 and 13 of the record). Creditors will be enjoined from prosecuting proceedings in other courts although instituted prior to the appointment of the receiver. *Morton vs. Stone Harbor Improvement Co.*, 44 Atl. Rep. 875.

In *Elm vs. International Steam Pump Company* (not reported) Vice Chancellor Stevenson said:

"Now, when this Court, the Court of Chancery, is asked to stay its hand and to refuse to administer the laws of New Jersey and to refuse to enforce its policy in the case of an insolvent corporation, in order that the corporation can remain in the exercise of its franchises in defiance of this statute, for the convenient continuance of the administration of these assets in a foreign court, why the application is simply too preposterous for consideration. It has been brought to our notice that since these proceedings were instituted, it has been necessary, and perhaps it was necessary prior to that, to bring in this corporation as a living entity in the exercise of its franchises to make consents and waivers in the federal court in aid of the administration over there. What an extraordinary spectacle it would be for the Court of Chancery to sit still and abdicate its function and keep this insolvent corporation alive, in order, in open violation of our statute and policy, that it might aid this unique proceeding—for that is what it amounts to—in a foreign court."

It is impossible that the statutory scheme of distribution should be carried through, if, at the

same time a court were permitted to administer the assets of the corporation upon a bill upon the trust fund theory.

In *Morse vs. Metropolitan Steamship Company,* 100 Atl. Rep. 219, in a proceeding for the appointment of a receiver and the administration of the affairs of the corporation under the general power of the court a receiver was appointed. Subsequently, an application was made to the court for the appointment of a receiver under the statute as will appear by the report of the case in *Morse vs. Metropolitan Steamship Company,* New Jersey Court of Errors and Appeals, 102 Atl. Rep. 525, and there was no question but that the appointment under the statute superseded the appointment under the general equity power of the court. On page 525 the Court of Appeals noticed that the first order made was an order appointing a receiver under the equity power of the court, and it was after this, that the order was made appointing a receiver under the statute, p. 526.

This must, in the nature of things, be so. The legislature has prescribed by statute a comprehensive scheme for the liquidation of all of the assets of the corporation and for its dissolution. It has provided a method by which claims can be determined. It has also provided for certain preferences and has forbidden other preferences.

An administration of the assets under the inherent jurisdiction of the court proceeds in a different manner. The distribution is different; the preferences are different. The method under the statute is wholly inconsistent with the proceedure under the inherent jurisdiction of the court, so much so that a bill praying for both or either in the alternative is multifarious.

Pierce vs. Old Dominion Copper Co., 67 N. J. Eq. 399;
Long vs. Long Co., 82 N. J. Eq. 544;

Even if the statutory procedure did not result in an abatement of ordinary suits against the corporation it would result in an abatement of proceedings which had been instituted looking to a complete distribution of the assets for, while the ultimate object of the two suits might be different, nevertheless one of the objects of both would be a distribution of the assets and under the law of New Jersey, which is applicable to non-residents as well as to residents, so far as investments in domestic corporations are concerned, immediately upon an adjudication of insolvency or of such facts as bring the statute into operation, a statutory method of distribution is provided.

The fact that proceedings under the New Jersey statute supersede proceedings under the general equity power of the court distinguishes the case from the situation which existed in Pennsylvania at the time *Lyon vs. McKeefrey*, 171 Fed. 384, (hereinafter noticed, p. 29 of this brief) was decided.

VI.

Unless the proceedings under the statute be held to supersede the proceedings in the Federal Court the policy of the law of New Jersey will be defeated.

It must be conceded, we think, that a State may legislate with respect to the method in and by which assets of an insolvent corporation incorporated under the laws of the State may be administered. It may provide not only for a scheme of distribution

but for certain preferences, certain liabilities on the part of directors and obligations on the part of stockholders. This method of dealing with the assets of an insolvent corporation must, we think, be conceded to be binding upon the corporation and upon all those who contract with it, whether they be residents or non-residents.

When the Federal Court, prior to an adjudication of the existence of the situation which brings into operation the statutory scheme, takes jurisdiction of the assets upon a bill filed for the purpose of having the Court take the assets, care for them and ultimately distribute them among creditors upon the trust fund theory (unless the assets are turned back to the corporation after relief from the temporary embarrassment existing at the time of filing the bill) can such Federal Court continue to administer the assets in its own way, and proceed to distribute them, without regard to the statutory method? Can it thus be allowed to defeat the policy of the law? There can be no doubt whatever that if the proceedings now pending in the Federal Court were pending in the Court of Chancery they would be superseded by the statutory proceedings. May a non-resident by going to the Federal Court secure and maintain a right not available to a resident under any circumstances? May a non-resident enforce a method of distribution which a resident could not enforce? Are there two sets of rights—not only remedial but substantive rights—one for the resident and one for the non-resident? The public policy of the sovereign State of New Jersey, as laid down by its legislative acts and interpreted and enforced by its courts, has established one set or system of rights only—not two—applicable alike to the resident and to the non-resident who deals as creditor or stockholder with the resident

corporation. To sustain the refusal of the respondent in the case *sub judice* to grant the applicant's prayer is to hold in effect that the rights of parties interested, residents and non-residents alike, are not to be measured or determined by the law or public policy of the State, because the proceedings happen to be pending in a federal tribunal; that not only remedial rights or matters of procedure are thus affected, but substantive rights—not only private but public rights.

VII.

The proceedings under the statute supersede the proceedings in the Federal Court.

It is conceded that the State may not by legislation so distribute its judicial remedies as to deprive the Federal Courts of jurisdiction in controversies between residents and non-residents.

Payne vs. Hook, 7 Wallace, 425, 19 L. Ed. 260.

But this restraint upon the power of the State applies only to prescriptions with respect to mode of redress. The State has complete power over matters of substantive law. A non-resident who seeks redress in a federal court either at law or in equity must rest his right upon the law of the State.

In *Ewing vs. City of St. Louis*, 5 Wallace 413, at p. 419, 18 L. Ed. 657, Mr. Justice Field delivering the opinion of the Supreme Court, said, "The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former".

In *Aspden vs. Nixon,* 4 Howard, 467, 11 L. Ed. 1059, the Supreme Court said, "It is proper, however, to remark, in this connection, that the courts of the United States held in Pennsylvania are administering the laws of that State, and bound by the same rules governing the local tribunals * *."

In *Gaines vs. Chew,* 2 Howard, 640, 11 L. Ed. 402, in an equity suit, the Supreme Court said, "Complaint is made that the federal government has imposed a foreign law upon Louisiana. There is no ground for this complaint. The courts of the United States have evolved no new or foreign principle in Louisiana. In deciding controversies in that State the local law governs, the same as in every other State".

In *Dupree vs. Mansur,* 214 U. S., 161, 53 L. Ed. 951, the court held that a statute of Texas providing for limitation of actions was applicable in equity. Mr. Justice Holmes, delivering the opinion for the court, stated, "Whether this be true or not, we hardly see how a court of law could disregard an express reservation of security, or how a lien so reserved can be called a purely equitable right. But, equitable or not, it is a creation not of the United States, but of the local law of Texas. If that law should declare the words in Bailey's deed purporting to reserve a lien unavailing, it would not be for the courts of the United States to say otherwise when sitting in equity any more than when sitting at law".

If a State has provided an adequate remedy at law in its courts which is equally available in the Federal courts, the equity jurisdiction of the Federal courts, which existed prior to the provision for the adequate remedy at law, will be ousted.

In *Union Pacific Railroad vs. Board of Commissioners,* Circuit Court of Appeals for 8th Circuit,

222 Fed. 651, the court said, "It is well established, as counsel for appellant contend, that State legislation on the subject of procedure cannot impair the remedial powers of Federal courts of equity. Over against this, however, stands the equally well established principle that the legislature of the State may, within constitutional limits, change the substantive law. Such changes will, of necessity, frequently produce changes in remedial relief. A system of practice which took no account of changes in the substantial rights of litigants would be anomalous indeed. Whole departments of equitable jurisdiction have been swept away by changes in the substantive law".

The court cited and quoted in extenso from the opinion of the Supreme Court in *Brine vs. Insurance Company*, 96 U. S., 627, 24 L. Ed. 858.

The Union Pacific case was reversed by the Supreme Court in 247 U. S., 282, 62 L. Ed. 1110, but upon the ground that the remedy at law provided for by the State statute was inadequate.

The legislature of the State of New Jersey has provided an exclusive remedy available to all creditors and stockholders of a corporation, resident or non-resident, and the remedy under the statute is available either in the federal courts in equity or in the court of Chancery of the State. When set in motion it supersedes prior litigations pending and draws to itself the administration of the estate and all matters appertaining thereto. This statutory remedy is as available to the non-resident in the Federal court as it is to a resident or non-resident in the State court.

In *Yonley vs. Lavender*, 21 Wallace, 276, 22 L. Ed. 536, the question involved was whether the Federal court in a proceeding brought by a non-resident against an administrator had power under

its judgment to seize the lands of the deceased in the possession of the administrator and sell them. The court said, "The several States of the Union necessarily have full control over the estates of deceased persons within their respective limits * *. We see no ground on which the validity of the sale in question can be sustained. To sustain it would be in effect to nullify the administration laws of the State by giving to creditors out of the State greater privileges in the distribution of estates than creditors in the State enjoy. It is easy to see, if the non-resident creditor, by suing in the Federal Courts of Arkansas, acquires a right to subject the assets of the estate to seizure and sale for the satisfaction of his debt, which he could not do by suing in the State Court, that the whole estate, in case there were foreign creditors, might be swept away. Such a result would place the judgments of the Federal Court on a higher grade than the judgments of the State court, necessarily produce conflict, and render the State powerless in a matter over which she has confessedly full control. Besides this it would give to the contract of a foreign creditor made in Arkansas a wider scope than a similar contract made in the same State by the same debtor with a home creditor. The home creditor would have to await the due course of administration for the payment of his debt, while the foreign creditor could, as soon as he got his judgment, seize and sell the estate of his debtor to satisfy it, and this, too, when the laws of the State in force when both contracts were made provided another mode for the compulsory payment of the debt. Such a difference is manifestly unjust and cannot be supported. * * The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting rights of the parties and will be observed by

the Federal Courts in the enforcement of individual rights. These laws, on the death of Du Bose and the appointment of his administrator, withdrew the estate from the operation of the execution laws of the State and placed it in the hands of a trustee for the benefit of creditors and distributees".

So in the case at bar, the laws of the State of New Jersey provide a method for the winding up of the affairs of an insolvent corporation. Substantive rights are created and taken away. To permit foreign creditors to proceed in the Federal court without regard to the statute after the company has been found insolvent and a receiver appointed under the State statute, would give them an undue advantage within the meaning of *Yonling vs. Lavender.*

In *Williams vs. Benedict,* 8 Howard, 107, 12, L. Ed. 1007, referred to in *Yonling vs. Lavender,* the Supreme Court held that a judgment creditor who obtained a judgment in the Federal Court against an administrator of an intestate estate before it has been declared insolvent could not obtain a prior lien by issuing execution after the estate has been declared insolvent.

The doctrine of the Yonling case is not affected by the decision of the Supreme Court in *The Rio Grande Railroad Company vs. Gomila,* 132 U. S., 478, 33 L. Ed. 400. In the latter case prior to the death of the decedent property of the decedent had been seized on execution for the satisfaction of a judgment obtained in the Federal Court and it was held that the property should not be surrendered to the administrator.

In *Meade vs. Beale,* 16 Federal Cases, No. 9371, Taney 339, it was held that the Federal Courts cannot grant any remedy where no right exists

either under the laws of the United States or of the State even though the English Court of Chancery may act, for the rule that the powers of the Federal Courts in equity are to be regulated by the rules of the English Chancery applies to the remedy, not to the right.

In *Ex Parte McNiel*, 13 Wallace, 236, 20 L. Ed. 624, the Supreme Court said, "A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality".

In *Lyon vs. McKeefry*, Circuit Court of Appeals, 171 Federal 384, it appeared that, subsequent to proceedings taken in the Federal Court for the administration of the affairs of a Pennsylvania Trust Company, proceedings were taken, under a statute of Pennsylvania, instituted by the Attorney General, which resulted in the appointment of a receiver. After the debts of the company had been paid the receiver applied to the Federal Court for an order directing that the assets be turned over to him rather than distributed to the stockholders. The court denied the application, whereupon an appeal was taken. The Circuit Court of Appeals reversed the lower court. After

noticing that the Pennsylvania State courts had determined that proceedings instituted under the statute did not supersede proceedings pending in the State courts of Pennsylvania (*Jones vs. Lincoln Savings and Trust Co.*, 71 Atl. 209) Judge Gray said, "Assuming the right of the court below to take jurisdiction of the cause, inasmuch as the appellant concedes that right, the court was exercising a jurisdiction concurrent with the courts of the State of Pennsylvania, and it was administering the law of that State. What a State court could have done it could do. The decision of the Supreme Court of Pennsylvania above referred to, sets at rest any doubt as to the jurisdiction of the court below to entertain a suit, unaffected by the proceedings in the Dauphin County Court of Common Pleas, under the provisions of the State statute above referred to. * * * The defendant corporation was a creature of the laws of Pennsylvania, and by those laws the rules governing its existence were prescribed. The measure of control to be exercised over its own corporations was determinable by the law and policy of the State to which they owed their being. By the legislation here in question, the State of Pennsylvania has seen fit to subject such corporation to supervision and administrative control and has ordained the proceedings, partly administrative and partly judicial, by which the life of such corporations may be determined and their affairs wound up and liquidated. The judicial proceeding is not one which may be instituted by private parties, but by the attorney general of the State acting on behalf of the Commonwealth and in the interest of the public. Such a proceeding is not one of which a United States court can have concurrent jurisdiction. It does not involve a con-

troversy between private parties, whether citizens of the same State or of different States".

The court then after again noticing the opinion of the Supreme Court of Pennsylvania, to the effect that proceedings instituted under the statute did not supersede other proceedings pending, directed that the surplus in the hands of the Federal receiver be turned over to the State receiver.

The court finally said, "The State of Pennsylvania has seen fit in the exercise of its plenary control over its own corporations, to provide for their dissolution, and has created an officer through whose hands the assets of a defunct corporation must pass to its stockholders. This legislation controls us, as it would control a State court, and we are compelled to the conclusion * * *".

In *Welsh vs. Union Casualty Insurance Company,* 238 Federal 968, it appeared that, after the statutory proceedings had been commenced by the allowance of a rule to show cause in the Supreme Court of Pennsylvania, a bill was filed by a non-resident, in the District Court of the United States, upon the filing of which bill a receiver was appointed. Subsequently a receiver was appointed by the State Court who applied to the Federal Court to release the assets. Subsequent to the decision in *Jones vs. Lincoln Savings and Trust Co.,* Pennsylvania had adopted a statute providing that whenever a receiver was appointed at the instance of the attorney general he should supersede any receiver appointed by a State court at the instance of an individual. The District Court judge denied the petition of the receiver and held that the Federal court having first taken jurisdiction of the assets would retain

them until the creditors were satisfied and that it would be time enough to apply to the District Court after the creditors were satisfied.

The Circuit Court of Appeals in *O'Neill vs. Welch*, 245 Federal, 261, reversed this decision. The Court declined to pass upon the question as to whether had the proceedings in the State court been commenced after the proceedings in the Federal court, the Federal Court would relinquish jurisdiction, holding that by the filing of the bill in the State court and the institution of proceedings, although a receiver was not appointed, the State court had acquired jurisdiction. The court, Woolley, J., said, "The Commonwealth of Pennsylvania has prescribed by law a comprehensive system of rules governing the incorporation and operation of insurance companies within its borders. It has undertaken, as a State function, their examination, regulation, and, when necessary, their dissolution. In assuming this function the State has defined rights conferred upon insurance companies and rights reserved to itself, imposed duties and prescribed remedies. In conferring upon insurance companies incorporated under its law the right to solicit business from the public, it imposed upon them the duty to be solvent and to conduct their business honestly, and reserved to itself the right to inquire both as to their solvency, and business conduct, and when necessary to stay their business and end their existence".

And further, "The act of the State in bringing suit was the exercise of a governmental power; the acts of the State court in pursuing a procedure established to insure the full accomplishment of that power stand for dominion over the entire subject matter in litigation, and subject the prop-

erty of the corporation to its jurisdiction for the full purpose of the judicial proceeding, which includes its possession, liquidation and distribution".

In *Kansas City Pipe Line Company v. Fidelity Title & Trust Company*, 217 Federal 187, the Circuit Court of Appeals for the 8th Circuit held that where receivers were appointed in a suit instituted by the State subsequent to the appointment of receivers by the Federal Court, the suit in the Federal Court having been commenced subsequent to the suit in the State Court, the suit in the Federal Court being for foreclosure of a mortgage, the Federal Court properly directed its receivers to turn over the property to the State receivers.

In *People vs. New York City Railway Company*, 107 N. Y. Supp. 247, growing out of the Metropolitan Street Railway receiverships, application was made to the State Court, after proceedings in the Federal Court had resulted in the appointment of receivers, for the appointment of a receiver under the statute of New York. Seabury, J., in appointing the receiver, said:

> "The fact that the Federal Court, upon the application of a general creditor and without notice to the Attorney General or any other public official of the State, appointed receivers of a railroad corporation, will not preclude the State from revoking the charter of such corporation in a proper case, and thus protecting its own rights and the interests of those resident within its territory. To deny its right to take this action is to question its power over its own creature. To assert that a Federal Court, which has appointed receivers of these franchises, will refuse to grant a request of the State court that it should surrender its possession to the

State court, to the end that the State may bring about their forfeiture, and in the meantime keep within the hands of its own agents the governmental powers which it has granted, is to contend that when the State seeks to take away the corporate existence the Federal court may keep it alive and continue its existence. If this be so, then the right of the State to forfeit the charter of a corporation may be suspended at the pleasure of the Federal court, and the sovereign power which the State alone is authorized to grant is exercised by the receivers of a Federal court against the will of the State. If such a proposition be sound, then the State governments no longer enjoy any real or effective power of control over the corporations which they create, and upon the application of any creditor of a foreign State and by the consent of the officers of the corporation the State may be ousted of its rights to forfeit corporate privileges, no matter how grossly those privileges may have been abused, and the public duties, for the proper performance of which the corporation was created, may be surrendered to the Federal courts, which are in no way responsible to the State. Certainly no principle of comity requires a State court to assent to such a proposition, or aid in establishing a precedent so disastrous in its consequence to the constitutional rights of the State."

"Such a doctrine I believe to be fundamentally wrong, without the sanction of any constitutional provision or statute, and one that can exist by virtue of no power other than that of usurpation. In view of the considerations urged above, and because the State court has exclusive jurisdiction of an action to revoke a corporate charter, and full authority and ability in such action to completely protect the rights and interests of those who invoke the jurisdiction of the Circuit Court, I believe that the motion for the appointment of receivers, in the present action, should be granted. Although this

court feels bound to take this action in order that the rights of the State of New York may be vindicated and protected, it instructs its receivers not to molest or interfere with the possession which the receivers of the Federal court have assumed, inasmuch as such receivers are now actually in the possession of such property. To the end that the questions involved may be settled in a proper and orderly manner, and in deference to that spirit of comity the observance of which has done so much to make productive of good results that dual system of jurisdiction which characterizes our government, this court instructs the receivers which it appoints to apply to the Federal court and on behalf of the State court to request the Federal court to relinquish its control over the corporate rights, privileges, franchises, and property involved, to the end that the purposes of this action may be carried out, and to assert whatever rights they may have by reason of their appointment as receivers of the property in question. This was the course approved in the cases of *Adams v. Mercantile Trust Company*, 66 Fed. 617, 15 C. C. A. 1; *Central Railroad Co. vs. Farmers Loan and Trust Company* (C. C.) 56 Fed. 357, and in both of those cases the Federal court complied with the request that was made to it."

No proceedings, so far as we can discover, were taken by the State receivers to obtain the assets. The matter is not covered by the opinion of the Supreme Court in re Metropolitan Street Railway receiverships, 208 U. S. 290.

In passing we respectfully direct the attention of the court to what this court said, in re Metropolitan Railway receiverships, 208 U. S. 90, 52 L. Ed. 403:

"While so holding we are not unmindful of the fact that a court is a very unsatisfactory body to administer the affairs of a rail-

road as a going concern, and we feel that the possession of such property by the court through its receivers should not be unnecessarily prolonged."

The jurisdiction of the District Court in the instant case was not invoked upon the ground of insolvency. The bill does not allege insolvency. In paragraph 12 the following allegation appears:

> "Your orators are informed and verily believe that the financial difficulties of the defendant are only temporary in their nature and can and probably will be overcome if the defendant can for a limited period be relieved of pressure from its matured and maturing obligations and its assets protected against disruption and waste through forced levies and sales, and its good will, and its organization preserved by a limited continuance of the business under the direction of some competent court of equitable jurisdiction that the directors of said defendant or some of them and the widow of the said William Necker are willing to extend credit to and procure credit for the defendant if they can be assured of the further continued existence of said business, but that they dare not do so if defendant is to be subjected to the pressure of an attack upon its assets by all of the creditors of the Company now holding matured or maturing obligations and claims against the same."

While it has been held that when a corporation becomes insolvent its assets are so much a trust fund and it is so far civilly dead as that its property may be administered as a trust fund, (*Graham vs. Railroad Company*, 102 U. S. 148, 26 L. Ed. 106). We do not know that it has ever been intimated by this Court that the Federal courts have the power to appoint a receiver as a mere manager for the purpose of establishing a moritorium. Yet this is precisely the situa-

tion which has resulted in the case at bar. If the courts have such a power as this, then it submitted that the exercise by the Federal receiver of the franchise of the corporation ought to be and is subject to the operation of the State law in exactly the same measure as its management by its directors and officers.

In *United States Shipbuilding Company vs. Conklin*, 126 Federal 132, there was an allegation of insolvency and of mismanagement of the directors and the right of complainants to have certain stock cancelled. In *Land Title and Trust Company vs. Asphalt Company of America*, 127 Fed. 1, there were allegations of insolvency, as also in *Mott vs. Buckhorn Portland Cement Company*, 179 Federal, 646.

In *Hirsch vs. Independent Steel Company of America* Circuit Court, West Virginia, 196 Federal 104, the District Court Judge held that the Federal Court had no jurisdiction in a suit brought to dissolve a corporation nor had it any jurisdiction at the suit of stockholders to take control of the assets of the corporation where there was no allegation of insolvency. An appeal to the Supreme Court was dismissed for lack of jurisdiction. 225 U. S. 698, 56 L. Ed. 1263.

In *Scattergood vs. American Pipe and Construction Company*, 249 Federal, 23, the Circuit Court of Appeals for the Third Circuit held that the court had jurisdiction at the suit of stockholders to take over control of assets where the allegations of the bill were substantially the same as the allegations in the bill filed in the case at bar. But the Second Circuit, Circuit Court of Appeals, had we think held otherwise.

McGuire vs. U. S. Mortgage and Trust Company, 203 Fed. 858. A writ of certiorari was

allowed by this court from the judgment of the Third Circuit Court of Appeals which is still pending undetermined. 247 U. S. 516.

Leadville Coal Company vs. McCreery, 141 U. S. 475, 35 L. Ed. 825, is not an authority in the case at bar. In that case there were proceedings instituted in the State Court to dissolve a corporation. After the Federal Court had proceeded to a final decree, which fixed the rights of the parties, the Supreme Court properly decided that it was then too late to interfere with the proceedings in the Federal Court. The Court said:

> "It would be an anomaly in legal proceedings if, after a court with full jurisdiction over property in its possession has finally determined all rights to that property, subsequent proceedings in a court of another jurisdiction could annul such decree, and disturb rights once definitely determined."

VIII.

The Proceedings in the Federal Court were in reality merely for the purpose of substituting, for the directors of the corporation, an appointee of the court, and for a moratorium, and so resulted. Such a receivership cannot prevent the operation of the State statute.

In the case at bar no final decree has been made, no rights have been settled. Up to the time of the appointment of the receiver in Chancery and the filing of his petition with the District Court, the business had been conducted by the receiver as a manager, precisely in the same manner as if the corporation had still been in the control of its directors and officers. The receiver

collected moneys, paid out moneys to satisfy obligations incurred by him as well as some incurred by the company; in other words ran the business as the corporation would have run it. The only difference was that because of the protection of the court, creditors could not sue and persons dealing with the corporation were deprived of the benefits secured to them, with respect to the liability and accountability of directors, by the laws of New Jersey. After running in this matter until April 1919, the business became, if it had not been before, insolvent. When proceedings are taken under the State laws providing for a method of dealing with corporations and their assets, in this condition, it is insisted that because the business has been and is being conducted by a manager or receiver appointed by a Federal Court, the laws are inapplicable. In other words, it must be contended that a Federal receiver may continue to operate an insolvent business with absolute disregard of the law of the State which created it, and which law is a part of its charter. It is respectfully submitted that this contention should not prevail. The business operated by the receiver is subject to the operation of the State law and the method prescribed by the State for the winding up of the affairs of insolvent corporations, as if it was being operated by the directors. Just as the appointment of a receiver by a state court cannot prevent the operation of the Bankruptcy Act, so the appointment of a receiver by a Federal Court, in a general administration suit, cannot prevent the operation of the State statute. The State law and State receivership proceedings under it operate on the corporation, its business and its assets no matter by whom its business is run.

IX.

The relief asked by the applicant should be granted.

Respectfully submitted,

Merritt Lane,

Dougal Heer,

Of Counsel with Petitioner.

Supreme Court of the United States.

In the Matter

of

The application of J. Raymond Tiffany, as receiver appointed by the Court of Chancery of New Jersey of William Necker, Inc., a body corporate, for a writ of mandamus, or in the alternative a writ of prohibition, against the Honorable J. Warren Davis, District Judge of the United States, for the District of New Jersey, and against the District Court of the United States for the District of New Jersey.

BRIEF FOR RESPONDENT.

On September 30, 1916, Frederick Kessler, et als, creditors and stockholders of William Necker, Inc., a corporation of New Jersey, filed a bill in the United States District Court for the District of New Jersey, against that corporation, alleging its insolvency and praying for the appointment of a receiver and the distribution of its assets among its creditors and stockholders. The complainants were residents and citizens of the State of New York and the jurisdictional allegation in the bill was the diversity of citizenship between the complainants and the defendant. The defendant appeared generally and answered the bill, admitting its allegations and joining in its prayer and asked

that its assets be sold and distributed according to law. On the same day, upon consent of both parties, the District Court appointed a receiver, which appointment was afterwards made permanent and the receiver under order of the Court first continued the business and subsequently sold the assets and reduced them to cash. The estate is grossly insolvent and the assets in the hands of the Federal receiver are insufficient to pay creditors in full and stockholders will receive nothing.

On April 1, 1919, two and a half years after the appointment of the receiver by the Federal Court, Frederick Michel and George Rank, creditors of William Necker, Inc., the above named corporation, filed a bill in the Court of Chancery of New Jersey, against it, alleging its insolvency and praying that it be decreed to be insolvent, that an injunction issue restraining it from exercising its franchises and that a receiver be appointed to dispose of its property and distribute the same among its creditors and stockholders. A decree was entered in said cause adjudging the corporation insolvent and appointing the petitioner in this proceeding, J. Raymond Tiffany, receiver in Chancery of the corporation. He thereupon made application to the United States District Court that the injunction issued by the Federal Court enjoining the corporation, its officers and all other persons from interfering with the possession of the Federal receiver of the company's assets, be dissolved; that the Federal receivership be vacated and that the Federal receiver turn over the assets of the company then in his hands less the administration expenses, to the Chancery receiver for final distribution.

The contention of the Chancery receiver urged before the Federal Court was that the State Court

proceeding superseded the Federal proceeding and that on the filing of the bill in the Court of Chancery, the Federal Court lost its jurisdiction.

Michel and Rank, the complainants in the Chancery suit had filed verified claims with the Federal receiver on October 21, 1916, and neither they nor any other person made any objection to the jurisdiction of the Federal Court until they filed their bill in Chancery. The District Court thereupon held that the consent to the jurisdiction given by the defendant by appearing and filing its answer, gave the Federal Court jurisdiction, and therefore denied the application of the Chancery receiver.

The Chancery receiver now applies to this Court for a writ commanding the District Court to order its receiver to turn over the assets to him so that he, and not the Federal receiver may distribute them among the creditors of the corporation.

POINT I.

The petition for a Writ of Mandamus should be denied because the petitioner has adequate relief by appeal to the Circuit Court of Appeals.

(A) The order of the District Court was appealable under Section 129 of the Judicial Code.

The application to the District Court made by the Chancery Receiver was for an order dissolving the injunction issued by it against the corporation and its officers and for an order vacating the receivership. Such an order comes within Section 129 of the Judicial Code which provides:

> "Where upon a hearing in equity in a District Court, or by a judge thereof in vacation, an injunction shall be granted, continued, re-

fused or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the Circuit Court of Appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating same, be taken directly to the Supreme Court."

The order complained of by the Chancery Receiver was therefore appealable to the Circuit Court of Appeals under the above quoted section.

(B) The order of the District Court was also appealable under Section 128 of the Judicial Code.

The order of the District Court refusing to dissolve the injunction and to vacate the receivership and to turn over the assets to the Chancery Receiver totally excluded him from any participation in the estate of the defunct corporation. Upon a final distribution of the corporation's assets, he would be totally ignored and distribution would be made to creditors direct. As he claimed title to the assets under the provisions of the New Jersey Corporation Act, the order complained of was, as to him, a final judgment depriving him of his property and under Section 128 of the Judicial Code he had the right to appeal to the Circuit Court of Appeals from this order as of a final judgment.

Gumbel vs. Pitkin, 113 U. S., 545;
Savannah vs. Jessup, 106 U. S., 563;
Dexter Horton Bank vs. Hawkins, 190 Fed. 924 (Same case) 194 U. S., 631.

The Writ of Mandamus should not be used for

the purpose of appeal and should be refused where the petitioner has other appellate relief.

In re Oklahoma, 220 U. S., 191;
In re Howard, 105 U. S., 191;
In re Harding, 219 U. S., 363;
In re Moore, 209 U. S., 490.

In ex parte Oklahoma, 220 U. S., 191, Chief Justice White said:

> "But we do not think we are called upon to test the accuracy of these as well as other conflicting contentions because we are of the opinion that consistently with the orderly course of judicial proceedings we may not pass upon them since we cannot do so without disregarding the plain statutory provisions providing means for reviewing the action of the Court which is complained of and which, if availed of, would afford complete and adequate remedy."
>
> "The principle under which the power to issue the extraordinary writ of prohibition may be exerted was thus stated in Huguley Manufacturing Company, 184 U. S., 301."
>
> > "'It is firmly established that where it appears that a court whose action is sought to be prohibited, has clearly no jurisdiction of the case originally, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right, but where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful or depends upon facts which are not made matter of record, the granting or refusal of the writ is discretionary (in re Rice, 155 U. S., 396), and that the Writ of Mandamus cannot be used to perform the office of an appeal or writ of error and is only granted as a general rule, where there is no other adequate remedy. (Atlantic City Railroad Company, 164 U. S., 633).'"

Since the petitioner could have the order reviewed by the Circuit Court of Appeals, the Writ of Mandamus should be refused.

POINT II.

Where a Federal Court has jurisdiction of the parties by reason of the diversity of citizenship, it has jurisdiction and power to appoint a receiver and to wind up the affairs of a corporation under the provisions of a State statute.

The bill of complaint filed in the District Court sets forth a clear case for relief under the provisions of Section 65 of the New Jersey Corporation Act, which are printed on page 9, et seq. of the petition filed herein. Under the Statute, the Court of Chancery on application of a creditor or stockholder may appoint a receiver and issue an injunction restraining the corporation and its officers from exercising its franchises where it appears that the corporation is insolvent and is not about to resume its business, or that its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, so that it cannot be conducted with safety to the public and advantage to the stockholders. The bill filed in the District Court alleges these very facts, to wit, that the credit of the company has been seriously affected; that suits by creditors have been brought against the company both by summons and by attachments; that it was unable to meet its current bills and that to permit the suits to proceed to judgment would result in the destruction of the business and the dissipation of its assets. There can be no doubt that had this complaint been

filed in the Court of Chancery of New Jersey and an application for receiver been made, that the Chancery Court would have appointed a receiver pursuant to the provisions of the Statute.

Where a State creates a statutory right which may be enforced in the Federal Court through its established common law or equity procedure, the Federal Court has jurisdiction to entertain a bill for the enforcement of such statutory right where jurisdiction exists because of the diversity of citizenship.

Clark vs. Smith, 13 Pet. 195;
Gormley vs. Clark, 134 U. S., 338.

In *Clark vs. Smith,* (p. 203) the Court says:

> "The State Legislatures certainly have no authority to prescribe the forum and modes of proceeding in the courts of the United States; but having created a right and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the Chancery side of the Federal Courts, no reason exists why it should not be pursued in the same form as it is in the State Courts."

In *Gormley vs. Clark,* the Court says:

> "And while the rule is thoroughly settled that remedies in the Courts of the United States are at common law or in equity, according to the essential character of the case, uncontrolled in that particular by the practice of the State Courts, yet an enlargement of equitable rights by State statute may be administered by the Circuit Courts of the United States as well as by the Courts of the State and when the case is one of a remedial proceeding essentially of an equitable character, there can be no objection to the exercise of the jurisdiction."

The jurisdiction of the Federal Courts to entertain a bill for creditors or stockholders against a corporation under a State statute has been upheld by the Circuit Court of Appeals for the Second, Third and Fourth Circuits. In the case of *Scattergood vs. The American Pipe Company,* 249 Fed. 23, the Court of Appeals for the Third Circuit sustained the District Court in taking jurisdiction even though the defendant in that case was a foreign corporation.

In *Maguire vs. The Mortgage Company,* 208 Fed. 858, the Court of Appeals for the Second Circuit reversed the District Court for appointing a receiver because the corporation was a foreign corporation, but Judge Noyes in delivering the opinion of the Court, upholds the jurisdiction of the Federal Court against a domestic corporation in a suit based on a State statute. He says that (page 859):

> "It is apparent that this is a stockholders' suit for the winding up through a receiver of the affairs of the defendant corporation and if it were a domestic corporation we should look for a Statute of New York authorizing the action prayed for. If we found such a statute and if it were broad enough to create a right in the complainant, it could be enforced in the District Court as a Court of equity by reason of diverse citizenship, and we should say that that Court had jurisdiction."

In *McGraw vs. Mott,* 179 Fed. 646, the Court of Appeals of the Fourth Circuit, sustained the decree of the District Court in West Virginia appointing an ancillary receiver to a receivership in the District Court of New Jersey where the original bill was based on Section 65 of the New Jersey Corporation Law.

In the McGraw case the Court quotes with approval the opinion of Judge Gray in *Land Title and Trust Company vs. Asphalt Company,* 127 Fed. 1, as follows:

> "The statute and laws of the United States provide an additional forum to that of the State for the adjudication of suits involving controversies between citizens of different States, not a different law. While State legislation cannot directly enlarge or contract the jurisdiction of the Federal Courts, it can create rights that are justiciable in such Court which without such legislation were not cognizable therein."

Referring to the New Jersey Statute, he says:

> "A suit under these sections of the Act, is therefore cognizable in the United States Circuit Court having jurisdiction of the parties on its equity side. The right so created will be enforced by the remedies prescribed by the Act so far as the same are consistent with and not violative of the general equitable rules and procedure as administered in the Federal Courts of Equity."

The District Court of New Jersey, therefore, had jurisdiction to entertain the bill filed by Kessler against the Necker Company for relief under the New Jersey Corporation Law.

POINT III.

The District Court had jurisdiction to appoint a receiver and administer the assets of the defendant corporation under its inherent equity powers.

The complainant set forth not only a case under the New Jersey Statute, but also the ordinary creditors' bill against an insolvent corporation. Courts of equity have inherent power to appoint

receivers of insolvent corporations or corporations that cannot fulfill their objects. (*Morse v. Metropolitan Co.*, 100 At. Rep. 219.)

Federal Courts have all the powers of a Court of equity and have always entertained creditors' bills against corporations.

In the matter of Reisenberg, 208 U. S., 90;
Scott v. Neely, 140 U. S., 106;
McGuire v. The Mortgage Co., 203 Fed. 858;
Penn. Steel Co. v. N. Y. Ry. Co., 198 Fed. 737.

In the matter of Reisenberg, the Court says at page 109:

> "It is also objected that the Circuit Court had no jurisdiction because complainants were not judgment creditors but were simply creditors at large of defendant railways. The objection was not taken before the Circuit Court by any of the parties to the suit, but was waived by the defendant consenting to the appointment of the receiver and admitting all facts averred in the bill. (*Hollins vs. Breierfield Coal Co.*, 150 U. S. 371.) That the complainant has not exhausted its remedy at law, for example not having obtained judgment or issued execution thereon, is a defense in an equity suit which may be waived as is stated in the opinion in the above case and when waived the case stands as though the objection never existed."

This doctrine of the Federal Courts has been recognized by the State Courts of New Jersey.

Gallagher v. The Asphalt Co., 67 N. J. Eq., 441;
Hitchcock v. American Pipe Co., 107 At. Rep. 267.

In Gallagher against the Asphalt Company (supra) a bill was filed in the Court of Chancery for the appointment of a receiver after a receiver had been appointed by the Federal Courts. Vice Chancellor Stevenson, to whom the application was made, refused the appointment for a receiver and in discussing the jurisdiction of the Federal Courts, says at page 451:

> "Now as the Federal Courts have entertained this suit simply so far as it is a proceeding to sequestrate assets for the benefit of creditors and ancillary to that have granted an injunction, which of course, *they had a perfect right to do,* such injunction is not the statutory injunction * * *."

At page 452 he says:

> "* * * The Federal receiver has undertaken the work of sequestrating all the assets of the insolvent corporation. The Federal Court of Appeals holds that the Circuit Court of the United States has full jurisdiction of the corporate assets and it has of course jurisdiction over the corporation."

He further says at page 454:

> "But I really consider this matter under protest because it is not for this Court to pass upon the action or non-action of the United States Circuit Court. The remedy of this complainant is with that Court. This Court cannot hear these suggestions that were attempted to be made that this particular creditor cannot get justice in the United States Circuit Court for reasons which were not disclosed. Of course this complainant can get justice there and that Court is open. If this complainant wants to have a receiver appointed in this Court, I think she will have to show that there is some asset of this corporation which a receiver of this Court can collect or may collect which the Federal receiver has failed to collect, has not reduced

> to possession, has declined to undertake to collect, and that he, the applying creditor here, has exhausted the ordinary remedies such as I have described which are open to him in the Federal Court to bring about an effort to collect this particular asset."

And at page 455:

> "And I may say further that in my judgment the appointment of a receiver at the present time for the purpose of doing the thing which the complainant desires to have done would be against all the rules of comity which are well settled and which always ought to be maintained."

The Hitchcock case (supra) was the basis for the decision in the instant case for the appointment by Vice Chancellor Lane of Mr. Tiffany as receiver. In that case a bill had been filed in the District Court of Pennsylvania and a receiver appointed. Hitchcock, the complainant in the Chancery suit appealed to the Circuit Court of Appeals for the Third Circuit on the ground that the District Court had no jurisdiction, but the Court of Appeals affirmed the decree of the District Court. Hitchcock thereupon filed his bill in the Court of Chancery of New Jersey and Vice Chancellor Lane appointed a receiver. The suits were subsequently settled and dismissed and in dismissing the Chancery suit the Court granted an allowance to the solicitors for the complainant from which order the defendant corporation appealed to the New Jersey Court of Errors and Appeals. It is true as the petitioner states on page 23 of his petition that the order reversed referred only to the question of allowance to the solicitor for the complainant, but it cannot be admitted that the reversal by the Court of Errors and Appeals of New Jersey was without criticism of the remarks of the Vice Chancellor with respect to the nature of the Chan-

cery proceeding. The Court of Appeals on this point at page 269 says:

> "No real substantial benefit could be derived by any stockholder from this proceeding, and its only purpose was to raise in another way the very question decided against the complainant by the Federal Court, and what Vice Chancellor Stevenson said in Gallagher against The Asphalt Company (67 N. J. Eq., 441) may well be applied, which was:
>
> > "'The complainant's application in this cause amounts simply to this: That she prefers to come to this Court and wilfully refuses to go to the Federal Court. She wants this Court to consider that she cannot get justice or full justice in the learned or distinguished Court, the Federal Court established here, and she therefore wants this Court practically to sit in judgment upon what the other Court has done.'"

This quotation from the opinion of the Court of Errors and Appeals shows clearly that it was not content to reverse the order for allowance upon the simple ground that the solicitor had performed no services in the Court of Chancery for which an allowance had been made him but the Court intended to register its opinion that the appointment of a receiver by the Federal Court, of a New Jersey corporation at the instance of a stockholder, was within the jurisdiction of the Federal Court, and that a subsequent proceeding in the State Court for the same purpose was a duplication of effort which should not be commended.

Respectfully submitted,

SAMUEL HEYMAN,
Attorney and Counsel for
THOMAS F. MARTIN,
Federal Receiver.

Supreme Court of the United States.

In the Matter

of

The application of J. Raymond Tiffany, as receiver appointed by the Court of Chancery of New Jersey of William Necker, Inc., a body corporate, for a writ of mandamus, or in the alternative a writ of prohibition, against the Honorable J. Warren Davis, District Judge of the United States, for the District of New Jersey, and against the District Court of the United States for the District of New Jersey.

Return of J. Warren Davis, District Judge of the United States, for the District of New Jersey and the District Court of the United States for the District of New Jersey.

TO THE HONORABLE EDWARD D. WHITE, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

In compliance with the order to show cause why the prayer of the petitioner should not be granted, issued by this Honorable Court on November 17, 1919, the above named respondents do hereby respectfully present that:

On September 30, 1916, a bill in equity was

filed in the United States District Court, District of New Jersey, by Frederick Kessler, Freda Kessler, Isaac Kraus, Theresa McCormick and John C. Hitchman, residents and citizens of the State of New York, against William Necker, Inc., a citizen and resident of the State of New Jersey, alleging the insolvency of the defendant and praying for the marshalling and administration of its assets. John C. Hitchman was a creditor and the other complainants were stockholders of the defendant company and the bill was filed on their behalf and on behalf of all other creditors and stockholders of the defendant who desired to join in the prosecution thereof. On the same day, September 30, 1916, the defendant company filed its answer admitting the allegations of the bill of complaint and joining in the prayer thereof and praying that this Court might take possession of all of the property and business of the defendant through the appointment of a receiver, and preserve and protect the property and pay all indebtedness out of the proceeds arising from the sale of the property, and otherwise deal with the same on general equitable principles. The bill and answer were on the same day presented to the respondent, J. Warren Davis, then holding said Court, and counsel for the respective parties appeared and on motion by the complainants not opposed but consented to in open Court, a decree appointing a temporary receiver of William Necker Inc. was entered and filed in the said cause. The order appointing the receiver contained a rule directing creditors and stockholders to show cause before the said Court on October 16, 1916, why the receivership should not be made permanent, and upon the return thereof on October 16, 1916, on motion of the complainants and no one appearing in opposition, the receivership was made perman-

ent. Copies of the bill of complaint, answer, order appointing the receiver and order making the receivership permanent are annexed to the petition filed in this cause and marked Schedule A and B.

Thomas F. Martin, the receiver appointed by this Court immediately qualified and entered upon the performance of his duties as receiver in accordance with the terms of the said order, Schedule B, and continued the business of the corporation from that time up to September 23, 1919, when the physical assets of the defendant were sold under order of this Court at public auction. The receiver filed five reports showing his administration of the defendant's assets on all of which notices were sent to all creditors and stockholders to show cause why the reports should not be confirmed, and no one appearing in opposition, orders of confirmation were entered. Frederick Michel and George Rank, creditors of the defendant, filed verified claims with Thomas F. Martin, receiver on October 21, 1916, and neither they nor any other creditor or stockholder of the defendant made any objection to the jurisdiction of the said Court or to the continuance of the receivership until April 1, 1919, when the said Michel and Rank filed a complaint in the Court of Chancery of New Jersey, for the purpose of winding up the business and dissolving the defendant corporation; in which suit that Court appointed a receiver who applied to the United States District Court for an order suggesting that the Chancery proceeding supersede the District Court proceeding, and directing Thomas F. Martin, Federal receiver, to turn over the property of the defendant in his possession to the receiver in the Court of Chancery. This application by the Chancery receiver was made about two and one-half years after the

appointment of the Federal receiver and more than a month after he had filed his fifth report wherein he recommended that the business be discontinued and the property be sold. The petition of the Chancery receiver is marked Schedule D of the petition herein. The Court heard the counsel of the parties fully on all the questions raised thereby and decided the same and on August ,1919, in the exercise of its jurisdiction and official discretion, made an order denying such petition, a copy of said order is annexed to the petition on page 116.

On August 22, 1919, an order was made in the said Court directing Thomas F. Martin, the receiver, to sell the property of the defendant at public auction on September 23, 1919, which was accordingly done. The assets in possession of the Federal receiver are insufficient to pay creditors in full.

Reasons for the making of the orders referred to herein appear in the memorandum filed in said cause, a copy of which is annexed to the petition and marked Schedule H. All orders and decrees were made upon due notice to all parties in interest or upon the appearance of the parties, and in the exercise of the jurisdiction and official discretion of the respondents. This return refers to all papers in the case relating to any motion petition or application of Raymond Tiffany, receiver in Chancery, copies of which are attached to his petition.

The receiver has duly qualified in accordance with the different orders appointing him or extending his receivership.

Samuel Heyman, Esquire, Attorney for the Federal receiver, having desired to be heard, in order to secure him such opportunity, the respond-

ents hereby designate him or such associate counsel as he may select to present this return and to file such brief and make such argument as may be required on the order to such cause.

Dated: December 17, 1919.

J. WARREN DAVIS,
U. S. District Judge.

(Seal)

EX PARTE IN THE MATTER OF J. RAYMOND TIFFANY, AS RECEIVER, ETC., PETITIONER.

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION.

No. 26, Original. Argued January 19, 1920.—Decided March 1, 1920.

Where the District Court, in a case depending on diverse citizenship, having appointed a receiver to take charge of and disburse and distribute the assets of an insolvent state corporation, permitted a receiver later appointed for the same corporation by a court of the State to intervene and, after full hearing, denied his application to vacate the federal receivership and to have the assets turned over to him upon the ground that the proceedings in the state court had deprived the District Court of jurisdiction, *held*, that the order of the District Court denying the application was a final decision, within the meaning of Jud. Code, § 128, appealable to the Circuit Court of Appeals. P. 36.

The words "final decision" in that section mean the same thing as "final judgments and decrees," used in former acts regulating appellate jurisdiction. *Id.*

When there is a right to a writ of error or appeal, resort may not be had to mandamus or prohibition. P. 37.

Rule discharged.

THE case is stated in the opinion.

Mr. Merritt Lane, with whom *Mr. Dougal Herr* was on the brief, for petitioner:

The order of the District Court was not appealable under § 129 of the Judicial Code.

The application of the receiver in chancery was not to dissolve the injunction but that the District Court should instruct its receiver to turn over the assets to the chancery receiver before distribution to creditors.

And if application had been made to dissolve the injunctive order contained in the order appointing the receiver it would not have been appealable under § 129.

Such is the effect of the decision in *Highland Avenue & Belt R. R. Co.* v. *Columbian Equipment Co.*, 168 U. S. 627.

An order refusing to vacate a receivership is not made appealable under § 129.

The action of the District Court is not appealable under § 128. That section applies only to final judgments or decrees. The opinion of the District Court in denying petitioner's application is not appealable.

The present application is similar to that made by the petitioners in *Re Metropolitan Railway Receivership*, 208 U. S. 90, which this court determined on the merits.

If the award of the writ prayed for be a matter of discretion, we respectfully submit that the discretion should be exercised, because the matter involves a conflict between the federal and state courts which should ultimately be settled in some form of proceeding in this court. The applicant in fact represents the Court of Chancery of New Jersey, which in its turn represents the State in its sovereign capacity.

Moreover, before proceedings on appeal could be determined in the Circuit Court of Appeals, and in this court, the assets would be distributed and the questions involved would become merely academic.

Mr. Samuel Heyman for respondent:

The application to the District Court made by the chancery receiver was for an order dissolving the injunction issued by it against the corporation and its officers and for an order vacating the receivership. Such an order comes within § 129 of the Judicial Code.

The order was therefore appealable to the Circuit Court of Appeals under that section.

The order was also appealable under § 128 of the Judicial Code.

It totally excluded the chancery receiver from any

participation in the estate of the defunct corporation. Upon a final distribution of the assets, he would be totally ignored and distribution would be made to creditors direct. As he claimed title to the assets under the provisions of the New Jersey Corporation Act, the order was, as to him, a final judgment depriving him of his property and under § 128 of the Judicial Code he had the right to appeal to the Circuit Court of Appeals from this order as a final judgment. *Gumbel* v. *Pitkin*, 113 U. S. 545; *Savannah* v. *Jesup*, 106 U. S. 563; *Dexter Horton Bank* v. *Hawkins*, 190 Fed. Rep. 924; *s. c.* 194 U. S. 631.

The writ of mandamus should not be used for the purpose of appeal and should be refused where the petitioner has other appellate relief. *Ex parte Oklahoma*, 220 U. S. 191; *Ex parte Harding*, 219 U. S. 363; *In re Moore*, 209 U. S. 490.

MR. JUSTICE DAY delivered the opinion of the court.

This is an application of J. Raymond Tiffany as receiver, appointed by the Court of Chancery of New Jersey, of William Necker, Inc., for a writ of mandamus, or in the alternative a writ of prohibition, the object of which is to require the District Judge and the District Court of the United States for the District of New Jersey to order the assets of the corporation, in the hands of a federal receiver, to be turned over to applicant for administration by him as receiver appointed by the New Jersey Court of Chancery.

An order to show cause why the prayer of the petition should not be granted was issued, a return was made by the District Judge and the matter was argued and submitted. The pertinent facts are: On September 30, 1916, creditors and shareholders of William Necker, Inc., a corporation of the State of New Jersey, filed a bill in the United States District Court of New Jersey alleging the

insolvency of the corporation, praying for the appointment of a receiver, and a distribution of the corporate assets among the creditors and shareholders. The bill alleged diversity of citizenship as a ground for jurisdiction. The defendant corporation appeared and answered, admitting the allegations of the bill, and joined in the prayer that its assets be sold and distributed according to law. Upon consent the District Court appointed a receiver. The estate is insolvent, and the assets in the hands of the federal receiver are insufficient to pay creditors, and shareholders will receive nothing. On March 28, 1919, two and one-half years after the appointment of the federal receiver, creditors of William Necker, Inc., filed a bill in the Court of Chancery of New Jersey alleging the corporation's insolvency, praying that it be decreed to be insolvent, that an injunction issue restraining it from exercising its franchises, and that a receiver be appointed to dispose of the property, and distribute it among creditors and shareholders. A decree was entered in said cause adjudging the corporation insolvent, and appointing the petitioner, J. Raymond Tiffany, receiver. Thereupon Tiffany made application to the United States District Court asking that its injunction enjoining the corporation and all of its officers, and all other persons from interfering with the possession of the federal receiver, be dissolved; that the federal receivership be vacated, and that the federal receiver turn over the assets of the company then in his hands, less administration expenses, to the chancery receiver for final distribution,—the contention being that the appointment of the chancery receiver and the proceedings in the state court superseded the federal proceeding, and deprived the federal court of jurisdiction.

The federal receiver had made various reports and conducted the business of the corporation up until the time of the application in the Court of Chancery of New

Jersey, in which the applicant was appointed receiver. It appears that the applicants in the state court also filed their verified claims with the federal receiver, and that no creditor or shareholder made objection to the exercise of the jurisdiction of the federal court until the application in the state court.

The Federal District Court permitted the chancery receiver to intervene, heard the parties, and delivered an opinion in which the matter was fully considered. As a result of such hearing and consideration an order was entered in which it was recited that Tiffany, the state receiver, had made an application to the Federal District Court for an order directing it to turn over to the chancery receiver all of the assets of the corporation in the possession of the federal receiver, and the District Court ordered, adjudged and decreed that the said application of J. Raymond Tiffany, receiver in chancery "be and the same hereby is denied."

By the Judicial Code, § 128, the Circuit Court of Appeals is given appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, with certain exceptions not necessary to be considered. It is clear that the order made in the District Court refusing to turn over the property to the chancery receiver was a final decision within the meaning of the section of the Judicial Code to which we have referred, and from which the chancery receiver had the right to appeal to the Circuit Court of Appeals. By the order the right of the state receiver to possess and administer the property of the corporation was finally denied. The words: "final decisions in the district courts" mean the same thing as "final judgments and decrees" as used in former acts regulating appellate jurisdiction. Loveland on Appellate Jurisdiction of Federal Courts, § 39. This conclusion is amply sustained by the decisions of this court. *Savannah* v. *Jesup*, 106 U. S. 563; *Gumbel* v. *Pitkin*, 113 U. S. 545;

Krippendorf v. *Hyde*, 110 U. S. 276, 287. See also a well considered case in the Circuit Court of Appeals, Ninth Circuit—*Dexter Horton National Bank* v. *Hawkins*, 190 Fed. Rep. 924.

It is well settled that where a party has the right to a writ of error or appeal, resort may not be had to the extraordinary writ of mandamus or prohibition. *Ex parte Harding*, 219 U. S. 363; *Ex parte Oklahoma*, 220 U. S. 191. As the petitioner had the right of appeal to the Circuit Court of Appeals he could not resort to the writ of mandamus or prohibition. It results that an order must be made discharging the rule.

Rule discharged.